LEXSEE

MARY RICHARDS, Plaintiff-Appellant, vs. MIDLAND BRICK SALES COMPANY, INC., Defendant-Appellee, and YARROW & KINSEY CONSTRUCTION COMPANY, INC., Defendant.

No. 5-604 / 95-156

COURT OF APPEALS OF IOWA

551 N.W.2d 649; 1996 Iowa App. LEXIS 60; CCH Prod. Liab. Rep. P14,704

May 31, 1996, Filed

PRIOR HISTORY: [**1] Appeal from the Iowa District Court for Polk County, Dale B. Hagen, Judge. Mary Richards appeals from an order granting Midland Brick Sales summary judgment on her claims of negligence, breach of implied warranty and strict liability.

DISPOSITION: AFFIRMED.

COUNSEL: David Wiggins of Wiggins, Anderson & Conger, P.C., West Des Moines, for appellant.

Mark E. Weinhardt and David K. Basler of Belin Harris Lamson McCormick, A Professional Corporation, Des Moines, for appellee.

JUDGES: Considered by Habhab, P.J., and Cady and Huitink, JJ. Sackett, and Vogel, JJ., take no part.

OPINION BY: CADY

OPINION

[*650] CADY, J.

Mary Richards appeals the dismissal of her claim for negligence, breach of implied warranty, and strict liability. We affirm.

Richards entered into a contract with Yarrow and Kinsey Construction Company to build a home in Ankeny, Iowa. The contract required Yarrow and Kinsey to use brick, which they purchased from Midland Brick Sales Company, Inc.

Construction of the house began in June 1983, and was completed in November 1983. The bricks were purchased during this period of time.

Around January 1, 1992, Richards began to notice the bricks used in the construction of the house were chipping [**2] and cracking. On November 9, 1993, she filed suit against Yarrow Construction as well as Midland Brick. Her claim against Midland Brick was based on negligence, breach of implied warranty of merchantability, and strict liability.

Midland Brick moved for summary judgment. It claimed no tort remedies were available to Richards as a matter of law since her suit did not involve personal injury. It also argued all claims were barred by the applicable statute of limitations. The district court granted the motion for summary judgment.

I. Summary Judgment

We review a ruling on a motion for summary judgment to correct errors at law. *Keller v. State,* 475 N.W.2d 174, 179 (Iowa 1991). Our task is to determine the existence of a genuine issue of material fact and whether the law is correctly applied by the district court. *Collins v. Kenealy,* 492 N.W.2d 679, 680 (Iowa 1992).

II. Negligence-Strict Liability Claims

It is a generally recognized principle of law that plaintiffs cannot recover in tort when they have suffered only economic harm. *Nelson v. Todd's Ltd.,* 426 N.W.2d 120, 123 (Iowa 1988); *Nebraska Innkeepers Inc. v. Pittsburgh-Des Moines Corp.,* 345 [**3] N.W.2d 124, 126 (Iowa 1984). This principle [*651] is known as the "economic loss doctrine." [1] Purely economic losses usually result from the breach of a contract and should ordinarily be compensable in contract actions, not tort actions. *See Nelson* 426 N.W.2d at 124-25. The rationale for this rule was first articulated by Chief Justice Traynor of the California Supreme Court in *Seely v. White Motor Company,* 63 Cal. 2d 9, 24, 45 Cal. Rptr. 17, 27, 403 P.2d 145, 155 (1965):

1 The "economic loss doctrine" is recognized as the majority view, but is not followed by all

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jurisdictions. *See* East River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858, 868-70, 106 S. Ct. 2295, 2300-02, 90 L. Ed. 2d 865, 875-76 (1986). Several courts have rejected the doctrine, while some courts take a middle position, permitting a claim for product liability under certain circumstances when the product alone is damaged. *Id.*

> The distinction that the law has drawn between tort recovery for physical injuries and warranty [**4] recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held [liable] for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.

Consequently, losses in product liability cases are generally limited to physical harm to the plaintiff or physical harm to property of the plaintiff other than the product itself. *Nelson,* 426 N.W.2d at 122-25. Economic losses [**5] to the product itself are excluded. *Id.* Notwithstanding, we ultimately look to the policies behind tort law and contract law to determine whether a loss is compensable in tort or in contract. If the damage was a foreseeable result from the failure of a product to work properly, the remedy lies in contract, since the loss relates to a consumer's disappointed expectations due to deterioration, internal breakdown or nonaccidental cause. *Nelson,* 426 N.W.2d at 125. On the other hand, when the harm is a sudden or dangerous occurrence resulting from a general hazard in the nature of the product defect, tort remedies are generally appropriate because the harm could not have been reasonably anticipated by the parties. *Id.*

In this case, Richards argues she has suffered more than economic loss because the defective brick caused actual damage to her home. [2] We reject this argument for two reasons. First, Richards submitted no evidence to show the brick caused actual damage to other portions of her home. *See* Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734, 742 (11th Cir. 1995) (plaintiff suffered only economic losses due to defective plywood used on roof of [**6] house even though it was necessary to remove and replace existing shingles and other roof components to replace defective plywood since the components were not damaged by the plywood, but replaced as a consequence of repairing the plywood). The damage in this case was limited to the product itself. Secondly, the policies underlying contract law relate to the nature of the damage claimed by Richards. The remedy for the economic loss and disappointment associated with the alleged failure of the bricks clearly lie in contract. Therefore, any recovery must be based on contract law, such as a breach of an express or implied warranty. The trial court [*652] correctly dismissed the negligence and strict liability claims.

> 2 Some courts have pointed out the economic loss rule applies only in a commercial context, Bowling Green Mun. Utilities v. Thomasson Lumber Co., 902 F. Supp. 134, 136 (W.P. Ky. 1995), not to a consumer who purchases goods for personal, residential use. Frankenmuth Mut. Ins. Co. v. Ace Hardware Corp, 899 F. Supp. 348, 351 (N.D. Mich. 1995). The plaintiff in this case does not argue the doctrine is inapplicable because the sale of the bricks was not a commercial transaction.

[**7] **III. Statute of Limitations**

The five-year statute of limitations governs actions for breach of implied warranty. Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911, 919 (Iowa 1990). Such actions must be filed within five years after they accrue. Iowa Code § 614.1 (4) (1993). Actions for breach of implied warranty accrue when delivery is made, regardless of the lack of knowledge of the breach. Iowa Code § 554.2725 (2). The discovery rule applies only when a warranty of future performance has been made, so that discovery of a breach must await performance. See *id.*

Richards claims the statute of limitation does not apply because the transaction was not a sale of goods but the rendition of services. We find nothing in the record to

suggest Midland supplied services to Richards. The transaction involved the sale of goods to a building contractor, and therefore, the limitation period defined by Iowa Code section 554.2725 (2) applies. Accordingly, Richard's claim for breach of [**8] implied warranty expired in 1988. The trial court properly dismissed her claim.

AFFIRMED.

LEXSEE

RAYMOND SCHUVER and STEVEN SCHUVER, Appellants, vs. E.I. DU PONT DE NEMOURS & COMPANY (INC.), Appellee, and SANBORN COOPERATIVE GRAIN COMPANY, Defendant.

No. 56 / 94-2081

SUPREME COURT OF IOWA

546 N.W.2d 610; 1996 Iowa Sup. LEXIS 271; CCH Prod. Liab. Rep. P14,683

April 17, 1996, Filed

PRIOR HISTORY: [**1] Appeal from the Iowa District Court for O'Brien County, James D. Scott, Judge. Appeal from adverse summary judgment ruling on farmers' claims against herbicide manufacturer for reduced corn yields allegedly caused by residual carryover effect of herbicide.

DISPOSITION: AFFIRMED.

COUNSEL: Michael R. Bovee of Montgomery, Barry & Bovee, Spencer, for appellants.

Donald J. Hemphill of the Hemphill Law Office, Spencer, and Raymond Michael Ripple, Wilmington, Delaware, for appellee.

JUDGES: Considered by McGiverin, C.J., and Lavorato, Neuman, Snell, and Ternus, JJ.

OPINION BY: LAVORATO

OPINION

[*611] LAVORATO, Justice.

Father and son farmers appeal from an adverse summary judgment ruling on all claims against the manufacturer of a herbicide based on successive reductions in corn yields. The farmers contend the reductions in corn yields resulted from the residual carryover effect of applying the herbicide to soybeans planted in rotation with the corn.

The district court concluded that federal law preempted some of the claims and concluded the remaining claims lacked merit. We affirm the ruling because we conclude federal law preempted all of the claims.

Background Facts.

O'Brien County farmer Raymond Schuver applied [**2] the herbicide Preview to his soybean crop in three successive years: 1988, 1989, and 1990. E.I. Du Pont de Nemours and Co. manufactured Preview. Sanborn Cooperative Grain Company sold the herbicide to Raymond. Raymond did not read Du Pont's application directions before applying Preview. He used Preview under normal growing conditions.

Raymond rotated his cropland yearly between soybeans and corn. In 1989 he began to notice problems with his corn crop. He had planted the corn on land sown to soybeans the previous year.

This problem persisted into the 1990 growing season. At this time Raymond discussed the problem with Sanborn's agronomist. The agronomist told Raymond that Raymond's neighbor had experienced similar damage to his corn crop. The agronomist attributed this damage to the residual carryover effects of applying Preview to soybeans planted on the same ground in the prior year. "Residual carryover effect" means the length of time an application of a pesticide might harm subsequently planted crops.

Raymond retired from farming in 1991. He rented his land to his son Steven on a cash basis. Steven farmed Raymond's land in 1991, 1992, 1993, and 1994. Steven did not use Preview [**3] on any of his crops. Nevertheless, Steven suffered damage to his corn crops because of the residual carryover effect from Raymond's use of Preview.

Background Proceedings.

The Schuvers filed a four-count petition against Du Pont and Sanborn. Count I alleged the defendants were negligent in the manufacture and sale of Preview to Raymond. Count II alleged a strict liability claim against

the defendants because Preview was defective and unreasonably dangerous. [*612] Count III alleged the defendants impliedly warranted Preview to be merchantable and fit for its intended purpose. Count IV alleged Sanborn expressly warranted to Raymond that Preview was the proper herbicide for the Schuvers to use on their farms.

Following the defendants' separate answers, the district court granted Du Pont's summary judgment motion--over the Schuvers' resistance--on all three counts against it. The case against Sanborn proceeded to a jury trial. The jury awarded damages against Sanborn and in favor of Raymond for crop damages and reduction in the fair market value of his land. The jury awarded crop damages to Steven. Sanborn is not involved in this appeal.

The case is before us on the Schuvers' appeal [**4] from the district court's summary judgment ruling against the Schuvers and in favor of Du Pont.

Scope of Review.

Our review of the grant or denial of summary judgment is at law. Iowa R. App. P. 4. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237. In determining whether a genuine issue of material fact exists, we look at the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Id.* The moving party carries the burden to show the absence of a material fact issue, and the resisting party is afforded every inference reasonably deducible from the evidence. *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995). We must determine on appeal whether (1) a genuine issue of material fact exists, and (2) the law was correctly applied. *Id.*

Federal Preemption.

The federal preemption doctrine is based on the Supremacy Clause of the federal constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State [**5] shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. A state court lacks subject matter jurisdiction to hear any matter that is federally preempted. *Clubine v. American Cyanamid Co.*, 534 N.W.2d 385, 386 (Iowa 1995).

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is a comprehensive federal statute regulating pesticide use, sales, and labeling. *Taylor AG Indus. v. Pure-Gro,* 54 F.3d 555, 559 (9th Cir. 1995). The FIFRA places enforcement authority in the Environmental Protection Agency (EPA). *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 601, 111 S. Ct. 2476, 2480, 115 L. Ed. 2d 532, 540 (1991).

In addition,

> all pesticides sold in the United States must be registered with the Environmental Protection Agency (EPA). 'The objectives and purposes of FIFRA include the strengthening of federal standards, increasing EPA authority for their enforcement, and providing a comprehensive and uniform regulation of the labeling, sale, and use of pesticides.' FIFRA establishes a complex process of EPA review that culminates in the approval of a label under which a product [**6] may be marketed. Manufacturers must submit draft label language addressing a number of different topics, including ingredients, directions for use, and adverse effects of the products, and a final label must be submitted to the EPA prior to registration.
>
> *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 71 (8th Cir. 1995) (citations omitted).

Before the EPA will allow a pesticide to be registered with it, the EPA administrator must determine whether:

> (A) its composition is such as to warrant the proposed claims for it;
>
> (B) its labeling and other material required to be submitted comply with the requirements of [FIFRA];
>
> (C) it will perform its intended function without unreasonably adverse effects on the environment; and
>
> (D) when used in accordance with

> widespread and commonly recognized [*613] practice it will not generally cause unreasonable adverse effects on the environment.
>
> 7 U.S.C. § 136a(c)(5)(A)-(D) (1994). Federal law additionally mandates that pesticide labels include (1) warnings and precautionary statements, and (2) directions for use. 40 C.F.R. §§ 156.10(h), (i) (1995).
>
> The FIFRA contains an express preemption clause regarding labeling [**7] requirements:
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v(b). It is undisputed that Preview is a pesticide registered with the EPA.

Following the holdings of a number of federal circuits, we recently held that "state actions based on the adequacy of warnings or instructions on the labels of EPA-registered pesticides are preempted" under the Preemption Clause. *Clubine,* 534 N.W.2d at 387.

In *Clubine,* several farmers sued two herbicide manufacturers for crop damage. They alleged claims for strict liability, implied warranty of merchantability, express warranty, and negligent failure to test, label, and provide adequate instructions and warnings regarding use of their herbicides. With the exception of negligent testing, we held that the FIFRA preempted all of these claims:

> We conclude the trial court correctly ruled that it could not reach the merits of plaintiffs' claims. Under the statutory definition those claims are label-based, and, because they depend on requirements in addition to--or different from--those [**8] imposed under FIFRA, are preempted. Each of the claims (that the herbicides were defective and unreasonably dangerous, that they breached an implied warranty of merchantability, and that they breached an express warranty) is derived from the assertion of factual matters FIFRA expressly places within the exclusive dominion of the EPA. The trial court was correct in so holding.

Clubine, 534 N.W.2d at 387.

We also held that the trial court was correct in dismissing the negligent testing claim for failure of proof. The plaintiffs produced no evidence of negligent testing on the part of the defendants. 534 N.W.2d at 387-88.

We decided *Clubine* after the parties here had completed their briefing. So the parties did not discuss *Clubine* in their briefs. The parties, however, did discuss *Clubine* in oral arguments. Counsel for the Schuvers conceded that the Schuvers' implied warranty claims are preempted under our holding in *Clubine*. But counsel refused to concede that the Schuvers' negligence and strict liability claims are preempted. Counsel argued that (1) contrary to our holding in *Clubine,* the negligence claims here are not label-based, and (2) as to [**9] the strict liability claims, our holding in *Clubine* is dictum. Not surprisingly, counsel for Du Pont argued that our holding in *Clubine* supports preemption of all of the Schuvers' claims.

Given this posture of the case, we limit our preemption discussion to the Schuvers' negligence and strict liability claims.

Negligence claims. Consistent with the brief, the Schuvers' counsel argued the negligence claims against Du Pont are not based solely on the inadequacy of the Preview label. Counsel argued that Du Pont was negligent in four respects:

> 1. in marketing Preview in O'Brien County, Iowa, when Du Pont knew or should have known that soil types in O'Brien County were susceptible to Preview residual carryover;
>
> 2. in failing to withdraw Preview in a timely manner from sale in O'Brien county after learning of the crop damage caused by Preview in that county;
>
> 3. in failing to test Preview in O'Brien County soil types before releasing Preview for sale in O'Brien County;
>
> 4. in failing to notify in a timely manner O'Brien County farmers of the propensity of Preview to carry over.
>
> [*614] These allegations of negligence rest upon an alleged improper or inadequate [**10] testing or marketing claim. We think this is merely another way of arguing that Du Pont's labels should have warned against using Preview in O'Brien County. This failure to warn claim is clearly preempted by the FIFRA.
>
> One court reached the same conclusion in analogous circumstances. *See* Hue v. Farmboy Spray Co., 127 Wash. 2d 67, 896 P.2d 682, 692-93 (Wash. 1995) (en banc). The facts in *Hue* were these. Landowners sued, among others, a pesticide manufacturer. They alleged that a cloud of pesticides--formed from many individual applications on wheat farms--had drifted onto their homes and farms, damaging their crops and plants. The pesticide label contained detailed instructions and warnings as to the maximum amount of pesticides to be used, the need for extreme care to avoid drift, and how to safely use the pesticides under particular conditions and circumstances. *Hue*, 896 P.2d at 684-85.
>
> The *Hue* court first determined that the FIFRA preempted the plaintiffs' product liability claims based on inadequate warnings:
>
> Plaintiffs' claim based upon inadequate warnings or instructions is predicated upon a state duty to provide warnings and instructions that are necessary to make a product [**11] reasonably safe. Clearly, this duty constitutes a requirement for labeling or packaging in addition to or different from the information required under FIFRA. *The gist of plaintiffs' case is that pesticides like those at issue here should not be used in an area like the Horse Heaven Hills/Badger Canyon ecosystem, where there is a risk of long distance drift*

> *or mass air contamination. Clearly, this sort of caution should go on the label.* The labels for the pesticides at issue in this case contain dozens of detailed warnings and instructions, including warnings for specific states, warnings to use "extreme caution" to avoid drift if desirable plants are "downwind," even under low wind conditions, and specific instructions as to how to avoid drift. Therefore, the plaintiffs' inadequate warnings claim was correctly ruled preempted by the trial court.

896 P.2d at 692 (citation omitted) (emphasis added).

Turning its attention to the plaintiffs' negligence claims based upon inadequate testing and marketing, the *Hue* court likewise ruled that the FIFRA preempted this claim:

> The trial court also correctly held that plaintiffs' "negligence" claim against [the manufacturer] [**12] was preempted. The plaintiffs' negligence theory is not clearly articulated. The "negligence" claim against [the manufacturer] *resting upon alleged improper or inadequate testing or marketing was merely another way of contending that the labels should have warned against use in the Horse Heaven Hills or long distance drift. As the United States Supreme court ruled in Cipollone, the "negligence" claim in this case which was predicated upon the manufacturer's alleged deficiencies in testing and marketing was, in actuality, a "failure to warn" claim, that is preempted.*

896 P.2d at 692-93 (citation omitted) (emphasis added).

Here the Preview label provides the following warning:

> PRECAUTIONS
>
> Do not apply "Preview" Herbicide to soils with a pH greater than 6.8.
>
> CAUTION: Soil pH varies greatly even within the same field. pH variations as much as 2 pH units are common when the soil has a calcareous sub soil. Determine soil pH by laboratory analysis using a 1:1 soil:water suspension.

It is undisputed that if Preview is used on soils with a pH higher than 6.8, carryover damage can result. The gist of the Schuvers' four allegations of negligence is that [**13] Preview should not be used in O'Brien County because the land in this county has a tendency to have a pH greater than 6.8. As *Hue* points out, this sort of caution should go on the label. As mentioned, the label already cautions that Preview should not be applied to soils with a pH greater than 6.8. The claims of negligence against Du Pont are therefore preempted because they require--on Du Pont's label--additional or different [*615] information from that required under the FIFRA. *See* Taylor, 54 F.3d at 560 ("FIFRA preempts a common law claim if the legal duty that forms the basis for the claim imposes a state labeling requirement that is different from or in addition to the requirements imposed by FIFRA."); Clubine, 534 N.W.2d at 387 (farmers' claims that herbicides were defective and unreasonably dangerous and

that manufacturers breached implied warranty of merchantability and express warranty were expressly preempted by FIFRA; farmers' claims were label-based and depended on requirements in addition to or different from those imposed under FIFRA).

The FIFRA does not preempt all negligent testing claims. *Taylor* makes the following distinction:

> The Supreme Court [**14] in *Cipollone* held that a negligent testing claim based on a failure to warn theory is preempted because such a claim would "require a showing that [the manufacturers'] advertising or promotions should have included additional, or more clearly stated, warnings. . . ." Claims for negligent testing that are based solely upon the manufacturers' testing or research practices, not related to advertising or promotion, however, are not preempted by FIFRA.
>
> The only evidence that appellants offer in support of their assertion that the manufacturers failed to test adequately the defoliants is the allegedly inadequate product labels themselves. In short, the core of appellants' claim is that the manufacturers failed to mark accurately their labels. Such an allegation requires a showing that the labels should have included additional warnings and is preempted by FIFRA.

Taylor, 54 F.3d at 561-62 (citations omitted). As mentioned, the four allegations of negligence here are label-based. They are not based solely upon Du Pont's testing or research practices with regard to whether the product properly functioned.

Strict liability claim. In their brief the Schuvers state [**15] their strict liability claim this way: "[the] Schuvers' strict liability claim against Du Pont. . . is premised on [the] Schuvers' assertion that Preview was unreasonably dangerous for use on O'Brien County, Iowa farms, since O'Brien County had a large percentage of farms with high soil pH levels." The petition alleges that "Preview was defective and unreasonably dangerous by reason of its design, testing, inspection, manufacture and failure of warnings."

As with the negligence claims, the strict liability claim is label-based. As with the negligence claims, the gist of the strict liability claim is that Preview should not be used on land in O'Brien County because of the high pH levels there. Again, this is the kind of information that should be on the label.

The challenge is really to the adequacy of the label. Requiring this additional information would be imposing a requirement "in addition to--or different from--those imposed under FIFRA." *Clubine,* 534 N.W.2d at 387. For this reason, the strict liability claim is preempted under the FIFRA.

In addition, there is no record evidence that Preview was in a defective condition or unreasonably dangerous as those terms are used [**16] for strict liability purposes. A product is in a defective condition "only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." *Fell v. Kewanee Farm Equip. Co.,* 457 N.W.2d 911, 916 (Iowa 1990) (quoting comment g to section 402A of the Restatement (Second) of Torts (1976)).

> Strict liability applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products

> cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics. . . . That is not what is meant by "unreasonably dangerous". . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

457 N.W.2d at 916-17 [*616] (quoting comment *i* to section 402A of the Restatement (Second) of Torts)).

The label cautioned that (1) Preview should not be applied to soils [**17] with a pH greater then 6.8, (2) soil pH varies greatly even within the same field, and (3) soil pH should be determined by laboratory analysis. Presumably, Preview would be safe to use on soils with a pH less than 6.8. So Preview was not dangerous to an extent beyond that which would be contemplated by the ordinary consumer armed with that knowledge. Using Preview on soil with a pH greater than 6.8 or using Preview without determining pH by laboratory analysis would constitute a misuse of the product. In short, the Schuvers generated no genuine issue of material fact on their claim of strict liability.

Disposition.

The district court correctly sustained Du Pont's motion for summary judgment as to all of the Schuvers' claims. The FIFRA preempted those claims. Because the claims are preempted, our courts have no jurisdiction to hear the merits. Additionally, the Schuvers generated no genuine issue of material fact as to their strict liability claim. We therefore affirm.

AFFIRMED.

LEXSEE

JANET C. SHERMAN, Plaintiff-Appellant, v SEA RAY BOATS, INC., Defendant-Appellee, and K & M BOATING CENTER, an assumed name of SOUTH RIVER MARINE, Defendant.

No. 227450

COURT OF APPEALS OF MICHIGAN

251 Mich. App. 41; 649 N.W.2d 783; 2002 Mich. App. LEXIS 640; CCH Prod. Liab. Rep. P16,352; 47 U.C.C. Rep. Serv. 2d (Callaghan) 1011

March 5, 2002, Submitted
April 26, 2002, Decided

PRIOR HISTORY: [***1] Macomb Circuit Court. LC No. 00-000128-CZ.

DISPOSITION: Affirmed.

COUNSEL: Harvey Kruse, P.C. (by James Sukkar and Paul M. Bogos), for the plaintiff. Troy.

D'Luge, Miles & Miles, P.L.C. (by Brian J. Miles), for the defendant. Mt. Clemens.

JUDGES: Before: Hood, P.J., and Gage and Murray, JJ.

OPINION BY: Harold Hood

OPINION

[**784] [*42] HOOD, P.J.

Plaintiff appeals as of right from the trial court's orders granting motions for summary disposition and reconsideration by defendant Sea Ray Boats, Inc. We affirm.

On August 23, 1999, plaintiff filed a complaint based on the sale of a boat that occurred on June 15, 1985. Specifically, plaintiff alleged that she purchased a new 1985 Sea Ray boat manufactured by defendant from K & M Boat Company. [1] Plaintiff alleged that she purchased the boat with the legitimate expectation that its useful life would exceed twenty-five years. Plaintiff maintained the boat in accordance with the instructions provided in the owner's manual. There were no special or cautionary instructions addressing the care of the wood encased by the fiberglass structural members of the boat. In June 1997, plaintiff noticed an area of decaying wood shelving near the starboard battery. Plaintiff obtained a $ 4,310.50 repair estimate and authorized the repair in [***2] November 1997. Plaintiff alleged that the repair uncovered extensive [*43] "latent decay" in seventy-six percent of the stringers, bulkheads, and framing. Plaintiff allegedly received a repair estimate of $ 38,585.50 on August 18, 1998. Plaintiff suspended the repair effort and tendered a claim to defendant. Approximately one year after receiving notice of the repair costs, plaintiff filed this litigation.

1 K & M Boat Company was dismissed from the litigation at the trial level and is not a party to this appeal.

In her complaint, plaintiff raised the following claims against defendant: (1) breach of implied warranty of fitness and merchantability under the Uniform Commercial Code (UCC), MCL 440.2314; (2) breach of express warranty under the UCC, MCL 440.2313; (3) negligence; (4) design defect; (5) violation of the Magnuson-Moss Warranty Act, 15 USC 2301 *et seq.*; (6) breach of implied warranty of merchantability of the Magnuson-Moss Warranty Act; (7) violation of the Michigan [***3] Consumer Protection Act, MCL 445.901 *et seq.*; and (8) breach of contract. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) or (C)(8). [2] The trial court granted the motion for summary disposition with respect to all claims except "any negligence claims based on a product liability theory." Defendant moved for reconsideration of the denial of summary disposition with regard to the remaining tort claims, and the trial court granted the motion.

2 This litigation was originally filed in the Wayne Circuit Court. Defendant's motion for summary disposition requested a change of venue as alternative relief. The trial court granted the motion for change of venue only, and the merits

of the summary disposition motion were addressed after the case was transferred to the Macomb Circuit Court.

This case requires a consideration of the economic loss doctrine under Michigan law. The economic loss doctrine provides that "where a purchaser's expectations [*44] [**785] in a sale are frustrated because the product he bought is not working properly, his remedy [***4] is said to be in contract alone, for he has suffered only 'economic' losses." *Huron Tool & Engineering Co v Precision Consulting*, 209 Mich. App. 365, 368; 532 N.W.2d 541 (1995). In *Neibarger v Universal Cooperatives, Inc*, 439 Mich. 512; 486 N.W.2d 612 (1992), our Supreme Court adopted the economic loss doctrine. In *Neibarger*, the plaintiffs, owners and operators of a dairy farm, purchased a milking system designed by the defendant. After the system was installed in 1979, the plaintiffs' cattle died or were sold because of nonproductivity. The plaintiffs alleged that they did not discover, until 1986, that the vacuum system on the milking equipment had been improperly designed and installed. Consequently, in 1987, the plaintiffs filed suit alleging breach of express warranty, breach of implied warranty, and negligence. The Supreme Court held that the plaintiffs' exclusive remedy of recovery for economic loss caused by a defective product purchased for commercial purposes was provided by the UCC. The Supreme Court explained its basis for adoption of the doctrine:

A contrary holding would not only serve to blur the distinction [***5] between tort and contract, but would undermine the purpose of the Legislature in adopting the UCC. The code represents a carefully considered approach to governing "the economic relations between suppliers and consumers of goods." If a commercial purchaser were allowed to sue in tort to recover economic loss, the UCC provisions designed to govern such disputes, which allow limitation or elimination of warranties and consequential damages, require notice to the seller, and limit the time in which such a suit must be filed, could be entirely avoided. In that event, Article 2 would be rendered meaningless and, as stated by [*45] the Supreme Court in *East River* [*East River Steamship Corp v Transamerica Delaval Inc*, 476 U.S. 858; 106 S. Ct. 2295; 90 L. Ed. 2d 865 (1986) , *supra* at 866, "contract law would drown in a sea of tort."

Rejection of the economic loss doctrine would, in effect, create a remedy not contemplated by the Legislature when it adopted the UCC by permitting a potentially large recovery in tort for what may be a minor defect in quality. On the other hand, adoption of the economic loss doctrine will allow sellers to predict [***6] with greater certainty their potential liability for product failure and to incorporate those predictions into the price or terms of the sale.

Adoption of the economic loss doctrine is consistent with the stated purposes of the UCC. The availability of a tort action for economic loss would "only add more confusion in an area already plagued with overlapping and conflicting theories of recovery," while preclusion of such actions will lead to the simplification, clarification, and modernization of commercial law called for by § 1-102(2)(a). Moreover, because a majority of other jurisdictions have adopted the economic loss doctrine, our decision here will promote the uniformity called for in § 1-102(2)(c). [*Neibarger, supra* at 528-529 .]

Although they were dairy farmers, there was no indication that the plaintiffs had any expertise in milking systems, and the plaintiffs alleged that the statute of limitations governing products liability law applied. The Supreme Court concluded that the proper approach to determining the applicability of the economic loss doctrine required evaluation of the underlying policies of tort and contract law as well [***7] as the nature of the damages. *Id.* at 531. The Supreme Court examined [**786] the nature of the damages from the defective milking system, lost profits, and consequential damages, and determined that the action fell within the principles of the economic loss doctrine and was [*46] governed by the UCC and its statute of limitations. *Id.* at 533.

The parties dispute the extent of the application of the *Neibarger* decision to this transaction, the sale of a boat to an individual consumer for recreational purposes. [3] When determining the propriety of adoption of the economic loss doctrine, our Supreme Court noted the rationale for the doctrine cited by various jurisdictions. From these cited decisions, there is dicta in *Neibarger* to support the respective positions of each party. For example, the breach of warranty upon delivery provisions may be satisfactory in commercial settings, but are inconsistent with consumer actions against manufacturers for personal injury; [4] a proposition that supports plaintiff's position that the economic loss doctrine does not apply. However, it was also noted that, while a consumer should not be charged with bearing the risk [***8] of physical injury from [*47] a product, the consumer may be charged with the risk that the product will not match his economic expectations unless the manufacturer agrees to it. [5] Because of the disparity in the underlying rationale and the failure, in some contexts, to define the term "commercial," defendant requests that we adopt the federal maritime economic loss doctrine and apply it to this transaction. However, we conclude that plaintiff's tort actions are precluded by principles of Michigan law that evolved into the economic loss doctrine, and that resort to federal doctrine is unnecessary.

3 It is deceptive that plaintiff refers to consumer as opposed to commercial transactions. Black's Law Dictionary (7th ed), p 263, defines "commercial law" as the substantive law dealing with the sale and distribution of goods, the financing of credit transactions on the security of the goods sold, and negotiable instruments. . . . Although the term commercial law is not a term of art in American law it has become synonymous in recent years with the legal rules contained in the Uniform Commercial Code. [citations omitted].

A contract involving the sale of goods is actionable under the UCC. MCL 440.2102; *Citizens Ins Co v Osmose Wood Preserving, Inc*, 231 Mich. App. 40, 45; 585 N.W.2d 314 (1998). Additionally, the UCC has been applied to a transaction in goods sold to a consumer. See, e.g., *Leavitt v Monaco Coach Corp*, 241 Mich. App. 288, 291; 616 N.W.2d 175 (2000). Plaintiff alleges that a consumer, as opposed to a business, occupies a different bargaining position in a transaction involving a sale of goods from a merchant or manufacturer.

[***9]

4 *Neibarger, supra* at 522, citing *Parish v B F Goodrich Co*, 395 Mich. 271, 278; 235 N.W.2d 570 (1975).

5 *Neibarger, supra* at 527 quoting *Seely v White Motor Co*, 63 Cal.2d 9, 18; 45 Cal.Rptr. 17; 403 P.2d 145 (1965).

In *Hart v Ludwig*, 347 Mich. 559, 560; 79 N.W.2d 895 (1956), the parties entered into an oral contract for the care and maintenance of an orchard owned by the plaintiff. The defendant worked the orchard during the spring of 1952, but shortly after beginning work for the 1953 season, he refused to continue for unknown reasons. His alleged omissions included the failure to remove the shoots, to prune, to fertilize, and to protect against destructive animals. The plaintiff alleged that these omissions constituted negligence. *Id*.

The Supreme Court examined whether an action in contract could also support an action for tort and concluded:

We have simply the violation of a promise to perform the agreement. The only duty, other than that voluntarily [***10] assumed in the contract to which the [**787] defendant was subject, was his duty to perform his promise in a careful and skillful manner without risk of harm to others, the violation of which is not alleged. What we are left with is defendant's failure to complete his contracted-for performance. This is [*48] not a duty imposed by the law upon all, the violation of which gives rise to a tort action, but a duty arising out of the intentions of the parties themselves and owed only to those specific individuals to whom the promise runs. A tort action will not lie. [*Hart, supra* at 564-566.]

The analysis of whether a duty arose that was separate and distinct from a contractual duty was not premised on or affected by the relationship of the parties. That is, whether the parties were of equal bargaining power was not a precursor to application of this duty principle.

The principles of *Hart* continue to be applied. In *Ferrett v General Motors Corp*, 438 Mich. 235, 245; 475 N.W.2d 243 (1991), the Court held that there was no right arising at common law as a matter of public policy, separate and distinct from any contractual right, to be evaluated [***11] or correctly evaluated before being discharged from employment. The Court stated:

Cases recognizing a right to maintain an action in tort arising out of a breach of contract by the defendant, generally involve a separate and distinct duty imposed by law for the benefit of the plaintiff that provides a right to maintain an action without regard to whether there was a contractual relationship between the plaintiff and the defendant. . . .

We conclude that because there is no separate and distinct duty imposed by law to evaluate or correctly evaluate employees, Ferrett cannot maintain an action in tort against GM because it failed to undertake a third Performance Improvement Plan, or otherwise evaluate or reevaluate him before exercising its right to discharge him at will without regard to whether there was or was not cause to terminate his employment. [438 Mich. at 245-246.]

While plaintiff alleges that the maintenance of a tort action is appropriate because of "consumer" [*49] involvement in the sale of goods, a "consumer" transaction was held to be commercial despite the lack of equal bargaining power or knowledge held by the defendant. In *Ulrich v Federal Land Bank of St Paul*, 192 Mich. App. 194, 195; 480 N.W.2d 910 (1991), [***12] the plaintiffs, dairy farmers, borrowed $ 220,000 from the defendant Federal Land Bank (FLB) and secured the note by granting a mortgage on their farm to the defendant in 1980. In 1984, the plaintiffs stopped making payments on the note. The defendant foreclosed on the mortgage and purchased the plaintiffs' property at the foreclosure sale. The plaintiffs were unable to redeem within one year and were eventually evicted. The plaintiffs filed suit in 1986, alleging that the foreclosure was invalid, and pleaded theories of breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, breach of contract, and negligence.

The trial court granted the defendant's motion for summary disposition of all claims. *Id*.

The plaintiffs alleged a claim of negligence by the defendant FLB for failing to thoroughly research the fact that the plaintiffs could not generate enough cash flow to service the loan. This Court held that the plaintiffs failed to state a cause of action in negligence. While aware that other jurisdictions impose a duty of reasonable care in processing loan applications, this Court rejected such an action in Michigan:

[***13] [**788] It has often been stated that the sometimes hazy distinction between contract and tort actions is made by applying the following rule: if a relation exists that would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise it will not. See *Hart v Ludwig*, 347 Mich. 559, 565; 79 N.W.2d 895 (1956); *Nelson v Northwestern Savings & Loan Ass'n*, 146 Mich. App. 505; 381 N.W.2d 757 (1985); *Brewster v Martin Marietta Aluminum* [*50] *Sales, Inc*, 145 Mich. App. 641, 667-668; 378 N.W.2d 558 (1985). In the present case, plaintiffs have no contract right to enforce; they have already received the benefit of FLB's contractual promise to loan them $ 220,000. Thus, the question is whether FLB had a legal duty to exercise reasonable care in determining plaintiffs' eligibility for a loan. Despite plaintiffs' status as farmers, *this case concerns a commercial transaction*. We have already determined that no fiduciary duties existed between the parties on the facts alleged by plaintiffs. We now decline to create what is essentially a backdoor defense to the enforcement [***14] of plaintiffs' obligations by allowing plaintiffs to later claim that FLB acted negligently in allowing them to enter the contract in the first place. We therefore hold that, on the facts of this case, FLB had no independent legal duty to exercise reasonable care in determining plaintiffs' eligibility for a loan. Summary disposition was proper. [192 Mich. App. at 199-200 (emphasis added).]

Even though the plaintiffs, farmers, arguably could not have been deemed to be of equal knowledge or standing as the defendant bank, this Court nonetheless construed the transaction as commercial. Accordingly, in Michigan, the principles in *Hart* have been applied in circumstances where an employee or consumer purchases goods or enters into a transaction with an entity of greater knowledge or bargaining power.

Plaintiff's argument, that the economic loss doctrine applies only to "commercial" or "non-consumer" transactions, is without merit because case law provides that the principles of *Hart* evolved into the economic loss doctrine now applied to the UCC. In *Rinaldo's Const Corp v Michigan Bell Telephone Co*, 454 Mich. 65, 67; 559 N.W.2d 647 (1997), the plaintiff, [***15] a commercial and residential construction company, moved its place of business. The defendant transferred the plaintiff's telephone service to the new [*51] address. However, the plaintiff experienced various problems with the service and filed a cause of action in negligence in the circuit court. The defendant moved for summary disposition, arguing that the Michigan Public Service Commission (MPSC) had primary jurisdiction over the claim. The Supreme Court held that the jurisdictional question was resolved by whether the facts pleaded gave rise to a legal duty in tort independent of breach of contract. 454 Mich. at 82.

The Supreme Court then examined *Hart* and the distinction between misfeasance and nonfeasance to determine whether a negligence claim could be maintained by the plaintiff. The Court noted the distinctions:

Prosser and Keeton discuss the distinction further:

"*Misfeasance or negligent affirmative conduct in the performance of a promise generally subjects an actor to tort liability as well as contract liability for physical harm to persons and tangible things*. Generally speaking, there is a duty to exercise reasonable care in how one acts to avoid physical harm to persons and tangible things. [***16] Entering into [**789] a contract with another pursuant to which one party promises to do something does not alter the fact that there was a preexisting obligation or duty to avoid harm when one acts." [Torts, § 92, pp 656-657.]

This duty, however, does not extend to "intangible economic losses." *Id*. at 657. For this type of loss, "the manifested intent of the parties should ordinarily control the nature and extent of the obligations of the parties . . . ." *Id*. *In addition to acknowledging this distinction at least as far back as* Hart*, the distinction has more recently been applied to sales contracts under the UCC under the rubric of the economic loss doctrine." Neibarger v Universal Cooperatives*, 439 Mich. 512, 527; 486 N.W.2d 612 (1992). The concept has been approved in other contexts. See *Corl v Huron Castings, Inc*, 450 Mich. 620, 626-628; 544 N.W.2d 278 (1996) (refusing to apply the collateral source rule for tort [*52] damages to an employment contract); *Ferrett v General Motors Corp*, 438 Mich. 235, 243; 475 N.W.2d 243 (1991) (refusing to recognize a cause of action in tort for negligent [***17] evaluation of an employee).

In this case, as in *Hart*, the defendant agreed to provide the plaintiff with services under a contract. Like the defendant in *Hart*, Michigan Bell allegedly failed to fully perform according to the terms of its promise. While plaintiff's allegations arguably make out a claim for "negligent performance" of the contract, there is no allegation that this conduct by the defendant constitutes

tortious activity in that it caused physical harm to persons or tangible property; and plaintiff does not allege violation of an independent legal duty distinct from the duties arising out of the contractual relationship. Like the plaintiff in *Valentine* [*v* Michigan Bell Telephone Co, 388 Mich. 19; 199 N.W.2d 182 (1972)], "regardless of the variety of names (plaintiff gives the) claim, (plaintiff is) basically complaining of inadequate service and equipment . . . ." *Id.* at 22. Thus, under the principles outlined above, there is no cognizable cause of action in tort. [*Rinaldo's, supra* at 84-85 (emphasis added).]

Thus, Michigan case law expressly provides that an action in tort may not be maintained where a contractual agreement exists, unless a duty, separate and distinct from the contractual obligation, [***18] is established. In order to make this difficult distinction, an analysis of whether the omission is based on misfeasance or nonfeasance occurs. *Hart, supra.* If the omission is one of nonfeasance, a failure to act, the action lies in contract only. *Id*.

Having concluded that the *Hart* principles apply to this type of transaction, the issue becomes whether plaintiff's negligence action, alleging failure to instruct, caution, and warn is based on misfeasance or nonfeasance. In *Nelson v Northwestern Savings & Loan Ass'n*, 146 Mich. App. 505, 506; 381 N.W.2d 757 (1985), the parties entered into a mortgage agreement. [*53] Pursuant to the terms of the agreement, the defendant was to pay, from escrow, the fire insurance premiums due on the plaintiffs' home. The plaintiffs' home was destroyed by fire. Nine days later, the defendant received a notice of cancellation of the policy for nonpayment of the premium. This Court noted that the mere use of the terms "neglect" or "negligence" could not transform a breach of contract claim to a negligence claim. 146 Mich. App. at 509. The Court then held that the factual basis of the claim alleged nonfeasance for which [***19] no legal duty existed that could not be fulfilled by the enforcement of the contract itself. *Id*.

[**790] Applying the cited principles to the facts of this case, plaintiff's negligence claim based on failure to warn, caution, and instruct, is a claim of nonfeasance for which there is no duty alleged that is separate and distinct from a claim of breach of contract. Therefore, the trial court properly dismissed the negligence action.

Our conclusion is consistent with the principles and test stated in *Neibarger*. While plaintiff alleges that the application of the economic loss doctrine is contingent on whether a consumer is involved in the transaction, the test enunciated by the *Neibarger* Court provides that "the proper approach requires consideration of the underlying policies of tort and contract law as well as the nature of the damages." In this case, even if plaintiff could support a claim of negligence, any harm did not result in physical injury, but structural damage to the boat only. The nature of damages arises not from physical harm, but loss of economic expectation in the product. Additionally, the overriding concern of the economic loss doctrine [*54] provides that where a [***20] plaintiff seeks damages for economic losses only, tort concerns with product safety no longer apply, and economic expectation issues prevail. This conclusion is buttressed by the doctrine's origins from *Hart*'s duty principle. [6]

> 6 The decision of *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich. App. 393, 402; 586 N.W.2d 549 (1998), is also noteworthy. The *Metalux* Court concluded that it was appropriate to examine not only the parties involved, but the nature of the *use* of the product. In the present case, plaintiff purchased a wood boat that was used for recreational purposes in water. Damage to the boat was discovered twelve years after purchase. While plaintiff alleges that a distinction between her status as an individual consumer and a business entity should be established, in this context it is unlikely that her consumer status had an effect. That is, it is unlikely that a business entity could have negotiated a warranty for the period at issue in light of the foundational materials of the product that were placed in water.

[***21] Furthermore, in *Citizens Ins Co v Osmose Wood Preserving, Inc,* 231 Mich. App. 40; 585 N.W.2d 314 (1998), the defendant provided flame retardant chemicals that treated wood trusses and decking that was utilized in the construction of a restaurant. At least twelve years later, the materials treated with the defendant's chemicals collapsed. This Court rejected the plaintiff's attempts to distinguish *Neibarger* on its facts. Rather, this Court held that the fact that the owner was not in a position to negotiate the sale or foresee the injury could not avoid the economic loss doctrine, even in the absence of privity of contract. [7] *Id.* at 45. This Court also rejected the plaintiff's fraud in the inducement claim, holding that the claim was merely a restatement of the breach of warranty claim and did not fall outside the ambit of the economic loss doctrine. *Id*.

> 7 We note that, in the present case, the parties have not raised, addressed, or disputed any privity of contract issues. Therefore, we do not address it.

[*55] We note that plaintiff has also [***22] alleged a tort claim of design defect. However, this claim also contains a duty element. Specifically, a manufacturer has a duty to design its product to eliminate

any unreasonable risk of foreseeable injury. *Ghrist v Chrysler Corp*, 451 Mich. 242, 248; 547 N.W.2d 272 (1996). On the basis of the principles delineated in *Hart*, summary disposition of this claim was also proper. Additionally, summary disposition was proper where plaintiff's tort actions were merely restatements of the breach of warranty and breach of contract claims. *Citizens, supra*; see also *Maiden v Rozwood*, [**791] 461 Mich. 109, 135; 597 N.W.2d 817 (1999) (the gravamen of a plaintiff's action is determined by considering the entire claim that cannot be avoided by artful pleading). [8] Accordingly, the contractual claims raised by plaintiff bar the tort claims where the alleged duty breached is based on nonfeasance. *Hart, supra*; *Nelson, supra*.

8 Defendant requests that this Court adopt the federal economic loss doctrine because its application clearly supports its entitlement to summary disposition pursuant to *East River, supra*. However, even if we had concluded that the economic loss doctrine was inapplicable to plaintiff as an individual consumer, defendant failed to cite authority for the proposition that we may disregard Michigan precedent and adopt federal law. Furthermore, to fall within admiralty jurisdiction, the wrong must have occurred on navigable waters and the wrong must bear a significant relationship to traditional maritime activity. *East River, supra* at 863-864. There are insufficient allegations in the complaint to determine whether this test has been satisfied. Jurisdictional issues and other issues aside, we note that our conclusion is consistent with the application of the federal economic loss doctrine applied in *East River, supra*.

[***23] Plaintiff next argues that the trial court erred in granting summary disposition of her various claims for breach of warranty, breach of contract, and violation of consumer protections because the relevant statute of limitations did not expire. We disagree. Specifically, plaintiff argues that the breach of warranty [*56] claim was extended, pursuant to MCL 440.2725, on the basis of language contained in the owner's manual. MCL 440.2725 provides:

(1) An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than 1 year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

In the present case, plaintiff contends that [***24] while the breach of warranty claim otherwise would have been subject to a one-year period of limitation, the owner's manual extended the period by providing that an owner would enjoy years of trouble-free boating. However, in the record below, plaintiff did not submit any portion of the owner's manual. This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal. *Reeves v Kmart Corp*, 229 Mich. App. 466, 481 n.7; 582 N.W.2d 841 (1998) . Accordingly, plaintiff's reliance on the owner's manual to extend the warranty period is not supported by the record below. However, assuming that plaintiff had filed this documentation in the record below, it fails to extend the statute of limitations twelve years after purchase.

In the pages of the owner's manual submitted by plaintiff, the manual refers to "years of trouble free boating" and "family fun for many years to come." [*57] However, these statements in the manual fail to identify an explicit extension to future performance. *Baker v DEC Int'l*, 458 Mich. 247, 251 n.7; 580 N.W.2d 894 (1998); see also *Snyder v Boston Whaler, Inc*, 892 F. Supp. 955 (W D Mich, [***25] 1994). Accordingly, without an express duration of the future period, the cause of action accrued at the tender of delivery, and the limitation period expired. Therefore, this issue is [**792] without merit. Furthermore, we note that plaintiff's remaining warranty and consumer protection claims were properly dismissed pursuant to *Snyder, supra*. Lastly, we note that plaintiff's allegation that her breach of contract claim is extended by fraud principles is without merit. Plaintiff fails to cite any authority indicating that a fraud claim may revive a contract action. "A party may not leave it to this Court to search for authority to sustain or reject its position." *Staff v Johnson*, 242 Mich. App. 521, 529; 619 N.W.2d 57 (2000). [9]

9 Because of our conclusion regarding the propriety of dismissal of the entire complaint, we need not address the change of venue issue.

Affirmed.

/s/ Harold Hood

/s/ Hilda R. Gage

/s/ Christopher M. Murray

LEXSEE

Re: Shinn et al. v. Champion Mortgage Company, Inc.

Civil Action No. 09-CV-00013 (WJM)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2010 U.S. Dist. LEXIS 9944

February 5, 2010, Decided
February 5, 2010, Filed

PRIOR HISTORY: Shinn v. Champion Mortg., 2009 U.S. Dist. LEXIS 110240 (D.N.J., Nov. 25, 2009)

COUNSEL: [*1] Lewis G. Adler, Law Office of Lewis Adler, Woodbury, NJ; Roger C. Mattson, Woodbury, NJ, *Attorneys for Plaintiffs.*

Diane A. Bettino, Reed Smith, LLP, Pittsburgh, PA, *Attorneys for Defendant.*

JUDGES: WILLIAM J. MARTINI, UNITED STATES DISTRICT JUDGE.

OPINION BY: WILLIAM J. MARTINI

OPINION

LETTER OPINION

Dear Litigants:

This matter comes before the Court on the Motion to Dismiss of Defendant Champion Mortgage Company, Inc. ("Champion"), pursuant to Federal Rule of Civil Procedure 12(b)(6). Oral arguments were not held. Fed. R. Civ. P. 78. For the reasons set forth below, Defendant Champion's motion is **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

This action arises out of a mortgage loan obtained by Plaintiffs Stanley and Catherine Shinn ("the Shinns") from Defendant Champion in 2001. Cmplt. P 13. The Shinns are New Jersey residents. Cmplt. P 8. Champion, a non-depository licensed lender with its principal place of business in New Jersey, is a division of Key Bank USA, N.A. ("Key Bank"). Cmplt. PP 2, 14. Key Bank is a national bank headquartered in Ohio. Cmplt. P 7. Defendant retained the law firm of Fein, Such, Kahn, & Shepard ("Fein") as its counsel. Cmplt. P 3.

The Shinns' mortgage, obtained for the purchase of a [*2] home in Oaklyn, NJ, was in the amount of $ 102,000. Cmplt. Ex. B; *id.* P 1. The mortgage contract was executed on April 23, 2001. Cmplt. P 13. By October 2004, the Shinns had begun to miss payments. Cmplt. P 15. On February 22, 2005, Champion initiated foreclosure proceedings against the Shinns. Cmplt. P 16. On that same day, Champion also sent Plaintiffs a letter offering to reinstate the original mortgage and abstain from going forward with the foreclosure in exchange for a reinstatement fee in the amount of $ 7,981.07 (the "reinstatement fee"). Cmplt. P 17. The reinstatement fee was broken down as follows: $ 4,190.55 in principal and interest, $ 209.55 in late fees, $ 377.19 in deferred late fees, $ 60 in non-sufficient fund charges, $ 550.68 for a corporate advance balance, and $ 2,593.10 in attorneys' fees and costs. Cmplt. Ex. A. The letter specified that the reinstatement fee would have to be paid by March 7, 2005, or new figures would need to be obtained. *Id.*

On June 22, 2005, Champion sent the Shinns a new letter and contract (the "Forbearance Agreement") adjusting the amount of the required fees to $ 12,905.24, with a required down payment of $ 7,000. Cmplt. Ex. B. The document [*3] was on Champion letterhead. *Id.* The Forbearance Agreement also clearly states that "Champion Mortgage is a debt collector attempting to collect a debt and any information obtained will be used for that purpose." *Id.* The terms of the Forbearance Agreement were approved by Champion's mitigation loss manager and agreed to by the Shinns. Cmplt. P 19. There are no allegations by any party that the Forbearance Agreement is in default, and according to the Complaint, it has been paid in full. *Id.* There is no additional information about the status of the Shinns' reinstated mortgage.

On January 2, 2009, the Shinns filed a complaint with this Court against Champion and Fein. [1] They seek to bring the matter as a class action. [2] The Complaint

contains ten counts against Champion: (1) breach of contract, (2) negligence, (3) breach of the duty of good faith and fair dealing, (4) unjust enrichment, (5) unfair and deceptive assessment and collection of fees, (6) violation of the Fair Foreclosure Act, (7) violation of New Jersey court rules for attorneys' fees, (8) violation of the New Jersey Consumer Fraud Act, (9) violation of the Truth-in-Consumer Contract, Warranty, and Notice Act, and (10) violation [*4] of the Licensed Lenders Act. Specifically, Plaintiffs allege that Champion and Fein "engaged in a uniform scheme and course of conduct to inflate their profits by charging and collecting various fees not authorized by the loan documents or applicable law," including attorneys' fees and costs in excess of those actually incurred. Cmplt. P 20. The Complaint contains few additional or supporting factual details. The gravamen of Plaintiffs' claims appears to be that Champion overcharged the Shinns in connection with their mortgage and the Forbearance Agreement.

1 Although initially named as a defendant, Fein was dismissed from the action in November 2009.

2 At this juncture, the Court finds that Plaintiffs have sufficiently pled the requirements for federal diversity jurisdiction over a class action lawsuit, in accordance with the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). CAFA provides that federal jurisdiction exists over a class action in which any one plaintiff is diverse from any one defendant and the aggregate amount in controversy exceeds $ 5,000,000. The Court is cognizant of exceptions to CAFA, under which a federal court may or must decline jurisdiction depending on [*5] how many members of the proposed plaintiff classes are citizens of the state in which the action was filed, if the primary defendant is a citizen of that state as well. Nevertheless, the Court is satisfied that a sufficient number of the members of all proposed plaintiff classes would be domiciled outside the state of New Jersey to meet the requirements, having not seen any allegations or evidence to the contrary. *See* *Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 153 (3d Cir. 2009) (finding that the burden of proving the applicability of a CAFA exception falls upon the party opposing jurisdiction). The Court is also satisfied that a sufficient amount in controversy has been alleged. *See* *Lamond v. Pepsico, Inc.*, No. 06-CV-3043, 2007 U.S. Dist. LEXIS 42023, 2007 WL 1695401, at *3 (D.N.J. June 8, 2007). No objections to jurisdiction have been raised. However, the Court may decide to further probe diversity and amount in controversy at a later point in time and directs the parties to conduct jurisdictional discovery as the case progresses.

II. ANALYSIS

A. Standard of Review

In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b), all allegations in the complaint must be taken as true and viewed in the [*6] light most favorable to the plaintiff. *See* *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); *Trump Hotels & Casino Resorts, Inc., v. Mirage Resorts Inc.*, 140 F.3d 478, 483 (3d Cir. 1998). When deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court may consider only the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the plaintiff's claims are based upon those documents. *See* *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993). If, after viewing the allegations in the complaint in the light most favorable to the plaintiff, it appears that no relief could be granted "under any set of facts that could be proved consistent with the allegations," a court may dismiss a complaint for failure to state a claim. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984).

Although a complaint does not need to contain detailed factual allegations, "the 'grounds' of [the plaintiff's] 'entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007). Thus, [*7] the factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level. *See* *id.* at 1964-65. Furthermore, although a court must view the allegations as true in a motion to dismiss, it is "not compelled to accept unwarranted inferences, unsupported conclusions or legal conclusions disguised as factual allegations." *Baraka v. McGreevey*, 481 F.3d 187, 211 (3d Cir. 2007).

B. Count I--Breach of Contract

Count I alleges that the mortgage agreement and note contained a provision allowing Champion to be reimbursed only for actual expenses incurred, that Champion has charged Plaintiffs fees in excess of actual expenses, and therefore that Champion violated the terms of the contract. Cmplt. PP 20, 39, 41. Plaintiffs also allege that Champion failed to disclose in advance additional fees such as a $ 60 charge for returned checks. Cmplt. P 40. However, Plaintiffs do not cite or allege the existence of any contractual provision requiring such disclosures. Furthermore, Plaintiffs do not attach the note or mortgage, and the Complaint does not provide the

specific language of any contractual provisions that were allegedly breached. Rather, the Complaint says only [*8] that the loan documents were "standard form notes and mortgages" and that their provisions were "uniform." Cmplt. P 38.

To prevail on a breach of contract claim under New Jersey law, a plaintiff must prove four elements: (1) the existence of a valid contract between plaintiff and defendant; (2) defendant breached the terms of the contract; (3) plaintiff performed its obligations under the contract; and (4) plaintiff was injured as a result of defendant's breach. *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.,* 275 F. Supp. 2d 543, 566 (D.N.J. 2003) (citing *Coyle v. Englander's,* 199 N.J. Super. 212, 223, 488 A.2d 1083 (App. Div. 1985)).

Here, Plaintiffs' allegations are exceedingly vague, and Plaintiffs' failure to attach copies of the mortgage or note make it difficult for the Court to determine whether a breach has been sufficiently alleged to survive a motion to dismiss. To the extent that Plaintiffs allege breach of contract with respect to Defendant's failure to provide advance notice of fees such as the returned check fee, this claim fails and will be dismissed. Plaintiffs do not allege the existence of any contractual provision requiring advance disclosure of such fees. Without a contractual [*9] provision to that effect, there can be no breach. Likewise, to the extent that Plaintiffs allege that Defendant in general breached the Forbearance Agreement, this claim also fails. If Plaintiffs fail to allege the existence of a provision that was breached or specific conduct that constituted the breach, the claim cannot survive.

However, to the limited extent that Plaintiffs allege breach of a contractual provision prohibiting the charging of fees in excess of those actually incurred, Plaintiffs appear to have sufficiently stated a claim for which relief can be granted. Cmplt. P 41. Although Plaintiffs do not identify the specific language of the provision, at this stage in the proceedings, the Court must accept as true Plaintiffs' allegations that such a provision exists and that Defendant charged fees in excess of those incurred. *See Baraka,* 481 F.3d at 211. Plaintiffs also identify a breach of the provision, namely that with respect to attorneys' fees, costs of suit, recording fees, certificate fees, and sheriff's fees, Defendant allegedly charged them amounts higher than those actually expended. Cmplt. P 20. Plaintiffs further allege that they paid Defendant for these excessive [*10] charges and that they were harmed in the amount of the difference between the incurred charges and the amount actually charged by Plaintiff's. Cmplt. P 19.

Plaintiffs concede that they cannot ascertain the precise amount that they were overcharged, because Defendant has never provided them with itemized bills. Pl. Br. at 2-3. Nevertheless, Plaintiffs have sufficiently alleged the elements of the cause of action and provided sufficient background facts for this one narrow theory of liability only. Furthermore, the 12(b)(6) motion to dismiss standard requires the Court to use its common sense when deciding whether or not a plaintiff has sufficiently stated a claim for relief. *See Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009) (stating that "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense"); *see also Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The common sense and judicial experience of this Court suggest that in ordinary business circumstances, when a service is performed, it is typically accompanied by an itemized bill, particularly when [*11] one is requested. The Defendant's apparent failure to provide an itemization by no means conclusively establishes overcharging or that Defendant cannot justify its fees and expenditures. Nevertheless, at this juncture, it provides a sufficient basis, in conjunction with the above-mentioned reasons, to find that Plaintiffs have sufficiently stated a claim for breach of contract, on this particular theory of liability.

C. Count II--Negligence

The Complaint alleges that "Champion owed Plaintiffs and other Class members a duty of care with respect to servicing their mortgage loans," that Champion was negligent, and that Plaintiffs have suffered damages as a direct result. Cmplt. PP 44-47. To state a claim for negligence under New Jersey law, a plaintiff must demonstrate the following: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; (3) injury or harm to the plaintiff; and (4) proximate cause. *Anderson v. Sammy Redd and Associates,* 278 N.J. Super. 50, 56, 650 A.2d 376 (App. Div. 1995).

However, it is well settled in New Jersey that this claim is barred by the economic loss doctrine. *See Perkins v. Washington Mutual, FSB,* 655 F. Supp. 2d 463, 471 (2009). [*12] The economic loss doctrine provides that a tort remedy does not arise from a contractual relationship unless the breaching party owed an independent duty imposed by law. *Saltiel v. GSI Consultants, Inc.* 170 N.J. 297, 316, 788 A.2d 268 (2002); *Perkins,* 655 F. Supp. 2d at 471 (finding that the economic loss doctrine barred a negligence claim brought by a plaintiff mortgagor against a defendant mortgagee, because both were parties to the mortgage contract and there was no other duty owed). If a defendant owes a duty of care separate and apart from

the contract between the parties, then a tort claim such as negligence may lie. *Saltiel,* 170 N.J. 297 at 314, 788 A.2d 268. However, the mere failure to fulfill obligations encompassed by the parties' contract is not actionable in tort. *Id.* at 316-317.

Here, Plaintiffs and Defendant were parties to a contract, namely the mortgage and the note. Plaintiffs' claims are based on allegedly improper payments arising out of these contracts, which cannot give rise to a tort remedy. There is no other relationship between the parties. As Defendant argues, relevant authority demonstrates that a bank does not owe a duty of care to a borrower, even if the borrower is a consumer. *See* [*13] *United Jersey Bank v. Kensey,* 306 N.J. Super. 540, 553, 704 A.2d 38 (App. Div. 1997). Therefore, the negligence claim fails and must be dismissed.

Plaintiffs argue in their opposition brief that this case "is about more than the loan" and that the "impact to Mr. & Mrs. Shinn concerns their credit worthiness, the emotional upset from Defendants' egregious actions and possible loss of their home in addition to any contract damages." Pl. Br. at 21. However, courts have routinely rejected this argument. *See Skypala v. Mortgage Electronic Registration Systems, Inc.,* 655 F. Supp. 2d 451, 2009 WL 2762247, at *6 (D.N.J. 2009) (rejecting an identical argument because the court found it incredible that the defendant's alleged overcharging of fees in connection with the curing of the plaintiff's default could have a negative effect on the plaintiff's creditworthiness and because "it is axiomatic that a plaintiff cannot collect contract damages for emotional distress" (citations omitted)); Restatement (Second) of Contracts § 353 and Comment a ("Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional [*14] disturbance was a particularly likely result.... Damages for emotional disturbance are not ordinarily allowed."). The Court rejects this argument as well. The claim must be dismissed.

D. Count III--Breach of the Duty of Good Faith and Fair Dealing

Plaintiffs also allege that Defendant breached the duty of good faith and fair dealing. Cmplt. P 51. The duty of good faith and fair dealing is implicit in every contractual relationship in New Jersey. *Wilson v. Amerada Hess Corp.,* 168 N.J. 236, 244, 773 A.2d 1121 (2001). It operates to ensure that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Sons of Thunder, Inc. v. Borden, Inc.* 148 N.J. 396, 420, 690 A.2d 575 (1997). However, as Defendant notes, Plaintiffs have not sufficiently alleged a violation of this duty. Dft. Br. at 22. Indeed, Plaintiffs' Complaint does not identify any fruits of the contract to which they were entitled and with which Defendant interfered. Plaintiffs merely allege that they were overcharged. Therefore, the claim must be dismissed.

E. Count IV--Unjust Enrichment

Count IV alleges that Defendant was unjustly enriched at Plaintiffs' expense. [*15] Cmplt. P 57. In New Jersey, an unjust enrichment claim requires a plaintiff to allege that (1) at plaintiff's expense, (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying for it. *In re K-Dur Antitrust Litigation,* 338 F. Supp. 2d 517, 544 (D.N.J. 2004).

However, as Defendant argues, unjust enrichment is a legal theory providing for recovery only in the absence of a contract. *See Duffy v. Charles Schwab & Co., Inc.,* 123 F. Supp. 2d 802, 814 (D.N.J. 2000); *Shapiro v. Solomon,* 42 N.J. Super. 377, 383, 126 A.2d 654 (App. Div. 1956). When a valid and unrescinded express contract between the parties exists, courts will not permit recovery pursuant to the theory of unjust enrichment. *Ryan v. Federal Express Corp.,* 78 F.3d 123, 127 (3d Cir. 1996).

Plaintiffs present several arguments in opposition to Defendant's position. They argue that their contract claim is not an impediment to their quasi-contract claim because they are permitted to plead in the alternative. [3] Pl. Br. at 25. They also assert that Defendant's denial that it breached the contract means that Defendant is liable in quasi-contract. *Id.* Lastly, Plaintiffs argue [*16] that in order to dismiss the unjust enrichment claim, "the court must hold as a matter of law that the violations are a breach of contract." *Id.*

> 3 The Court notes that although Plaintiffs use the terms unjust enrichment, quasi-contract, and implied contract interchangeably, the three concepts are related but not entirely synonymous. *See* Restatement (Second) of Contracts § 4 Comment b (1981); *Luden's Inc. v. Local Union No. 6 of Bakery, Confectionary & Tobacco Workers Int'l Union of Am.,* 28 F.3d 347, 365 (3d Cir. 1994); *Terrace v. Williams,* No. 07-CV-099, 2009 V.I. Supreme LEXIS 36, 2009 WL 2043870, at *11 (V.I. July 1, 2009). Nevertheless, for the purposes of this motion, the Court will construe the meanings of these terms liberally and will deem Plaintiffs' use of any one as encompassing the meanings of all three.

The logic behind Plaintiffs' argument is extremely flawed. Contrary to Plaintiffs' assertions, Defendant does

not argue that Plaintiffs' contract claim prevents Plaintiffs from filing a claim for unjust enrichment. What Defendant does argue is that because a valid and unrescinded express contract exists, a fact that Plaintiffs do not meaningfully refute, Plaintiffs are not entitled to recovery under a [*17] theory of unjust enrichment. Dft. Br. at 24. This is simply because, given the existence of the express contract, there is no need to resort to alternate theories of recovery. Furthermore, the Court notes that a finding of no liability in contract does not guarantee a finding of liability under an alternative theory such as quasi-contract, nor the other way around.

Plaintiffs also argue that, contrary to Defendant's position, recovery in contract and in quasi-contract are not mutually exclusive. Pl. Br. at 25. However, the very case Defendant cites for this proposition states that the existence of an express contract does not preclude the existence of an implied contract only if "the implied contract is ***distinct*** from the express contract." *See* Baer v. Chase, 392 F.3d 609, 617 (3d Cir. 2004) (emphasis added) (stating that the "implied contract, if it is to be valid, must be entirely unrelated to the express contract. The existence of an express contract precludes the existence of an implied contract dealing with the same subject.") (internal citations omitted).

Here, although Plaintiffs do not state the nature of the implied contract that they allege, it seems that it would have to cover [*18] the very same ground as the express contract if, as Plaintiffs allege, it would prohibit the same conduct. Therefore, the Court finds no need to turn to alternate theories of recovery, because a valid and express contract exists between the parties that governs their rights. This Count must be dismissed.

F. Count V--Unfair and Deceptive Assessment and Collection of Fees

Plaintiffs allege that because Champion collected fees that were not permitted by the mortgage contract or by law, Defendant has violated Section 5(a) of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45(a). Cmplt. P 64. While Plaintiffs concede that there is no private right of action under the FTCA, they argue that a violation of the FTCA constitutes a violation of the New Jersey Consumer Fraud Act ("NJCFA") and that there is a private right of action under the NJCFA. Pl. Br. at 26; Cmplt. P 64.

Plaintiffs have not provided any authority in support of their contentions that collecting fees in violation of contract or law violates the FTCA or that violations of the FTCA constitute violations of the NJCFA. While the Court is willing to consider a novel argument, Plaintiffs must articulate some sort of rationale [*19] for their position. Because Plaintiffs have not provided any sort of reasoning or authority from an analogous point of view whatsoever, their claim fails and must be dismissed.

G. Count VI--Violation of the Fair Foreclosure Act

In Count VI, Plaintiffs allege that the Fair Foreclosure Act ("FFA"), N.J.S.A. 2A:50-57(b)(3), prohibits the charging of attorneys' fees and costs in excess of those allowed by the New Jersey court rules. Cmplt. P 66. They also allege Champion charged for costs and attorneys' fees in excess of the amount permitted by NJ Rule 4:42-9(a)(4), and that this conduct constitutes an unconscionable business practice under the NJCFA. Cmplt. PP 67-68.

The FFA provides a defaulting mortgagee the right to cure the default and reinstate the mortgage by, among other requirements, paying or tendering court costs and "attorneys' fees in an amount which shall not exceed the amount permitted under the Rules Governing the Courts of the State of New Jersey." N.J.S.A. 2A:50-57(b)(3). The relevant court rule identified by Plaintiffs, NJ Rule 4:42-9(a)(4), provides

> *In an action for the foreclosure of a mortgage,* the allowance shall be calculated as follows: on all sums adjudged to be paid [*20] the plaintiff amounting to $ 5,000 or less, at the rate of 3 1/2 %, provided, however, that in any action a minimum fee of $ 75 shall be allowed; upon the excess over $ 5,000 and up to $ 10,000 at the rate of 1 1/2 %; and upon the excess over $ 10,000 at the rate of 1%, provided that the allowance shall not exceed $ 7,500. If, however, application of the formula prescribed by this rule results in a sum in excess of $ 7,500, the court may award an additional fee not greater than the amount of such excess on application supported by affidavit of services. In no case shall the fee allowance exceed the limitations of this rule. NJ Rule 4:42-9(a)(4).

Plaintiffs fail to cite any authority demonstrating that charging legal fees in excess of New Jersey court rules violates the NJCFA. [4] But even assuming that this is true, Plaintiffs have not demonstrated a violation of the court rules, because NJ Rule 4:42-9(a)(4) governs the fees that can be charged in an action for foreclosure only. The Court does not find that NJ NJ Rule 4:42-9(a)(4) applies to legal fees associated with a forbearance agreement, particularly where the parties have contractually agreed to pay legal fees. *See* Amboy

National Bank v. Ahmed, No. L-3051-05, 2007 N.J. Super. Unpub. LEXIS 2265, 2007 WL 397055, at *6 (App. Div. February 7, 2007). [*21] Here, by the terms of the Forbearance Agreement, Defendant did not go forward with its action for foreclosure and instead the parties reached a settlement. In addition, the Forbearance Agreement stated that Plaintiffs "agreed under the terms of the note and mortgage to pay legal fees and costs [to Defendant] in the event of default." [5] After Plaintiffs' default, if Defendant had proceeded with the action for foreclosure, then the court rules would likely have applied. But because the parties settled, the rules do not apply. Thus, to the extent that Plaintiffs allege legal fees charged in connection with the Forbearance Agreement were excessive under the court rules, this claim fails.

> 4 However, Plaintiffs do cite to a case demonstrating that a violation of a rent control ordinance was actionable under the NJCFA. *See Wozniak v. Pennella,* 373 N.J. Super. 445, 862 A.2d 539 (App. Div. 2004). This case also states that the NJCFA is very broad and covers so many deceptive practices that they could not all be enumerated. Thus, just because a course of conduct is not specifically prohibited by the statute, that does not mean it does [*22] not fall within its scope. Nevertheless, this is too tenuous to establish that violating New Jersey court rules violates the NJCFA.
>
> 5 The Court notes that Plaintiffs' agreement to pay legal fees has no implications on their contract claim. An agreement to pay legal fees is not an agreement to pay excessive legal fees, *i.e.* fees beyond those permitted by the parties' agreement.

H. Count VII--Violation of New Jersey Court Rules for Attorneys' Fees and Costs

Plaintiffs allege that Defendant charged attorneys' fees and costs in excess of the amount permitted by NJ Court Rules and that a violation of the NJ Court Rules constitutes a violation of the NJCFA. Cmplt. P 71. As stated above, whether or not a violation of New Jersey court rules constitutes a violation of the NJCFA in the foreclosure context, Plaintiffs have failed to demonstrate a violation of the New Jersey court rules with respect to attorneys' fees here because the relevant court rule applies to foreclosure actions and not to settlements, the situation before this Court. This claim fails for the same reasons as Count VI and must be dismissed.

To the extent that Plaintiffs allege overcharging with respect to costs, in addition to [*23] attorneys' fees, this claim fails for identical reasons. The language of Rule 4:42-10(a), governing costs in a foreclosure action, mirrors the language of Rule 4:42-9(a)(4) and states that it applies to "an action for the foreclosure of a mortgage," not to a settlements of an action for the foreclosure of a mortgage.

I. Count VIII--Violation of the New Jersey Consumer Fraud Act

Plaintiffs allege that "the actions of the Defendants constitute unconscionable business practices in violation of the New Jersey Consumer Fraud Act." Cmplt. P 77. Plaintiffs fail to state which actions constitute unconscionable violations of the act. Even assuming that Plaintiffs' Complaint is speaking to the alleged overcharging of attorneys' fees and costs in violation of NJ court rules, this claim fails for the reasons stated above in Counts VI and VII and must be dismissed.

J. Count IX--Violation of the Truth-in-Consumer Contract, Warranty, and Notice Act

Count IX asserts that Champion violated New Jersey's Truth-in-Consumer Contract, Warranty & Notice Act ("TCCWNA"). Cmplt. P 80. The TCCWNA provides in pertinent part,

> No seller, lessor, creditor, lender or bailee shall in the course of his business ... enter [*24] into any written consumer contract ... which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time ... the consumer contract is signed or the warranty, notice or sign is given or displayed. N.J.S.A. 56:12-15.

A person who violates the TCCWNA is liable for a $ 100 civil penalty or actual damages, at the election of the consumer. N.J.S.A. 56:12-17.

In general, the TCCWNA prohibits entering into a contract which bargains away legal, but not contractual, rights. Assuming that the mortgage and note are "consumer contracts" to which the TCCWNA applies, Plaintiffs have not identified which provisions of either document allegedly violate a clearly established right of Plaintiffs or responsibility of the relevant defendants, as provided for by law. *See Perkins,* 655 F. Supp. 2d 463 at 470 (dismissing a claim brought pursuant to the TCCWNA because the plaintiff failed to identify which provisions of a mortgage or note allegedly violated a right clearly established by positive law as opposed to one established by contract). Therefore, the claims must be [*25] dismissed.

K. Count X--Breach of the Licensed Lenders Act

Count X alleged a violation of the Licensed Lenders Act. Plaintiffs concede that this count should be dismissed.

L. Litigation Privilege

Defendant raises the argument of litigation privilege and argues that it bars Plaintiffs' entire Complaint. Dft. Supp. Br. at 1. The litigation privilege is a well-established New Jersey doctrine that protects all statements made by attorneys or parties during the course of judicial or quasi-judicial proceedings. *Ruberton v. Gabage,* 280 N.J. Super. 125, 133, 654 A.2d 1002 (App. Div. 1995). Defendant asserts that the litigation privilege applies to all statements made by Defendants with respect to Plaintiffs' foreclosure and settlement procedures, such that the entire case cannot proceed. Dft. Supp. Br. at 1.

New Jersey courts have established that the litigation privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. *Hawkins v. Harris,* 141 N.J. 207, 216, 661 A.2d 284 (1995). The privilege is broadly construed and extends [*26] to statements made during settlement proceedings. *Rickenbach v. Wells Fargo Bank,* N.A. *et al.,* 635 F. Supp. 2d 389, 401 (D.N.J. 2009); *Loigman v. Twp. Comm. of Twp. of Middletown,* 185 N.J. 566, 587, 889 A.2d 426 (2006). Although it was initially meant to apply only to defamation and related causes of action, it has been applied to foreclosure proceedings and settlements as well. *Rickenbach,* 635 F. Supp. 2d at 401; *Ogbin v. Citifinancial Mortg. Co., Inc.,* No. 09-CV-0023, 2009 U.S. Dist. LEXIS 108961, 2009 WL 4250036, at *7 (D.N.J. November 19, 2009).

Defendant relies on the premise that Plaintiffs' entire action arises out of the Forbearance Agreement, such that most if not all of the supporting evidence would be privileged. This is simply not true. Plaintiffs' claims are inextricably linked to the original mortgage and note, which were drafted significantly prior to the commencement of any judicial proceedings and would not fall under the privilege's scope. Even the claims which appear to be based on the Forbearance Agreement (overcharging of attorneys' fees post-default) are also based on the mortgage and note, because the Forbearance Agreement merely reiterated Plaintiffs' obligations with respect to attorneys' fees established [*27] in the mortgage and note. It does not appear that any claims are based solely on documents created during the pendency of judicial or quasi-judicial proceedings.

Moreover, even if there were certain claims that were affected by the privilege, they would not be barred outright. At most, the privilege would prevent the admissibility of certain documents at trial, such as the Forbearance Agreement or the letter containing the first reinstatement fee. However, whether or not enough evidence would exist without those documents to prove Plaintiffs' claims is not a question to be decided at this juncture. Therefore, the Court finds that the litigation privilege has no effect on Plaintiffs' claims at this stage in the proceedings.

M. Voluntary Payment Rule

Defendant also raises the voluntary payment rule, arguing that it prevents Plaintiffs from bringing their Complaint. Dft. Br. at 12. Under this rule, when payments are made "under a mistake of law or in ignorance of law, but with full knowledge of the facts," those payments cannot be recovered absent a showing of fraud, duress, or improper conduct on the part of the payee. *In re Resorts, Inc.,* 181 F.3d 505, 511 (3d Cir. 1999).

Although Plaintiffs [*28] have not alleged duress, they most certainly do allege fraud. Cmplt. PP 64, 68, 77. Moreover, because Defendant never itemized the charges, it does not appear to the Court that Plaintiffs had full knowledge of the facts when they made payments to Defendant. Pl. Br. at 2-3. Additionally, to the extent that Defendant charged Plaintiffs for expenses beyond those actually incurred, Plaintiffs certainly did not have full knowledge of the facts. Thus, the voluntary payment rule might defeat claims alleging charges that exceeded statutory limitations, because any recovery would be due to Plaintiffs' mistake of law. However, the Court has already found alternate grounds upon which to dismiss those claims. The voluntary payment rule would not affect Plaintiffs' ability to recover fees paid that exceeded contractual limitations, because Plaintiffs were also operating under a mistake of fact that was allegedly propagated by Defendant.

N. Entire Controversy Doctrine

Finally, Defendant asserts that Plaintiffs' action is barred by the entire controversy doctrine. Dft. Br. at 8-9. The entire controversy doctrine requires parties to fully litigate all aspects of a dispute in a single legal proceeding [*29] including all purported claims, counterclaims, and crossclaims. *See Rycoline Prods. v. C & W Unlimited,* 109 F.3d 883, 887 (3d Cir. 1997); *Kaselaan & D'Angelo Assocs., Inc. v. Soffian,* 290 N.J. Super. 293, 299, 675 A.2d 705 (App. Div. 1996). It

applies not only to claims that were fully litigated but to those that settled as well. *Id.*

Defendant argues that any disputes with respect to fees and costs charged should have been raised during the foreclosure and settlement procedures. Dft. Br. at 12. The problem with this argument is that the alleged misconduct did not occur until the Forbearance Agreement was signed and Defendant enforced its terms by collecting the allegedly improper fees from Plaintiffs, at which point there was nothing that could be done except bring an additional action. Therefore, the Court finds that the entire controversy doctrine does not present a bar to Plaintiffs' action.

III. CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss is **GRANTED** in part and **DENIED** in part. The motion is **GRANTED** as to Counts II-X and **DENIED** as to Count I. Counts II - X are **DISMISSED WITH PREJUDICE,** as the Court finds that amendment would be futile. Count I remains, although it has [*30] been limited to the single theory of liability identified above. An appropriate order follows.

/s/ William J. Martini

WILLIAM J. MARTINI, U.S.D.J.

LEXSEE

ROBERT L. SMITH, Conservator of the Conservatorship of Steven Morrice, Appellant, v. DUANE HARRISON, Appellee

No. 328 / 66525

Supreme Court of Iowa

325 N.W.2d 92; 1982 Iowa Sup. LEXIS 1582

October 27, 1982, Filed

PRIOR HISTORY: [**1] Appeal from Ida District Court. Lawrence W. McCormick, Judge. On Review from Iowa Court of Appeals. Further review of court of appeals decision affirming a district court judgment dismissing a petition to cancel a farm lease.

DISPOSITION: DECISION OF COURT OF APPEALS AFFIRMED.

COUNSEL: Morris C. Hurd, Ida Grove, for Appellant.

John P. Duffy of Connell & Duffy, Storm Lake, for Appellee.

JUDGES: LeGrand, P.J., and Uhlenhopp, McCormick, Larson and Schultz, JJ.

OPINION BY: McCORMICK

OPINION

[*92] This case is an action in equity by a conservator who seeks cancellation of a [*93] farm lease entered by his ward. Plaintiff Robert L. Smith is conservator of Steven Morrice. The principal conservatorship asset is a 320-acre Ida County farm which Morrice leased in 1975 to defendant Duane Harrison for ten years at an annual cash rental of $23 per acre. The conservatorship brought this action in 1979, one year after the voluntary conservatorship was established. In attacking the lease, the conservator relied on theories of fraud, undue influence, unjust enrichment, and unconscionability. Harrison counterclaimed. After trial, the court found insufficient evidence to support either the petition or counterclaim [**2] and entered judgment accordingly. The conservator appealed and Harrison cross-appealed. The court of appeals affirmed on the conservator's appeal by operation of law because of a two-to-two division, one judge not participating. All participating judges voted to affirm on the cross-appeal. We granted further review on the conservator's appeal only. We now affirm the court of appeals.

Because the action is an effort to set aside a written instrument affecting real estate, the conservator had the burden to establish his entitlement to relief by clear, satisfactory and convincing proof. *See* McCarter v. Uban, 166 N.W.2d 910, 912 (Iowa 1969).

We recite the facts as we find them in our de novo review. Harrison has farmed the Morrice farm since 1967, succeeding his father as tenant. He grew up on the farm. He first farmed under a cropshare lease and in 1973 entered a five-year cash rental lease providing for rental of $23 an acre.

In the fall of 1975 Morrice asked Harrison if he would like to buy the farm, and Harrison said he would if they could agree on a price and he could obtain financing. They discussed the subject several times, and Harrison investigated possible financing. [**3] Morrice did not set a price on the farm, however, but instead suggested they enter a long-term lease during which they might be able to work out a sale. He made it very clear he wanted Harrison to farm the land whether he bought it or not. The two men went together to the office of Ida Grove attorney Daniel Williamson who, at their request, prepared the ten-year lease at issue here, which they executed.

Morrice was 85 years old when the lease was executed. At the time of trial he was 90 years old and resided in a nursing home. Although the conservator did not assert he was incompetent, Morrice did not testify by deposition or in person. The conservator claimed Morrice was barely literate, feeble in mind and body, and suffered from near blindness at the time the lease was executed. No medical evidence was offered in support of this claim, and the only witnesses who offered any support for it were the conservator and the conservator's

daughter. Defense witnesses testified that at the time the lease was executed Morrice drove an automobile, went to town on a daily basis, conversed about crops and weather, was alert, kept track of grain prices, and took care of his business affairs. Attorney [**4] Williamson testified that Morrice was alert and "very definitely appeared to know what he was doing" when he directed Williamson to prepare the lease. The terms were discussed before the lease was executed.

The conservator offered testimony of an expert farm manager who said that a fair and reasonable rental for the farm in 1975, based on its corn suitability rating, was $70 an acre. Harrison testified that, in keeping with Morrice's wishes, he farmed the land "lightly," keeping half of it in hay and pasture and rotating hay and crop ground. Approximately 276 acres of the land were available for hay and crops. Harrison also offered evidence showing cash rental rates on neighboring farms that witnesses said were comparable to the Morrice farm. One rental from 1958 to 1975 was at $14 per acre, one from 1973 to 1975 at $25 per acre, and one from 1976 to 1978 at $30 per acre.

I. *Actual and constructive fraud.* The elements of actual fraud are delineated in *Beeck v. Kapalis*, 302 N.W.2d 90, 94 (Iowa 1981), and principles of constructive fraud are discussed in *Curtis v. Armagast*, 158 Iowa 507, 520-21, 138 N.W. 873, 878 (1912). We find a failure of proof of fraud on either basis [**5] in this case.

[*94] II. *Undue influence*. To establish undue influence it was necessary for the conservator to prove that Harrison utilized unfair persuasion sufficient to overcome Morrice's free agency in obtaining the lease. *See Stephenson v. Stephenson*, 247 Iowa 785, 797, 74 N.W.2d 679, 686 (1956). The conservator's proof failed on this theory also.

III. *Unjust enrichment*. Unjust enrichment is a doctrine of restitution. *See Glass v. Minnesota Protective Life Insurance Co.*, 314 N.W.2d 393, 397 (Iowa 1982). The conservator's unjust enrichment claim begs the question in the present case. Any benefits received by Harrison were received pursuant to the lease. It was not unjust for him to receive them unless the lease should be set aside. Thus a ground for invalidating the lease must be established before a basis for restitution exists.

IV. *Unconscionability*. The conservator's unconscionability theory rests on his characterization of Morrice's 1975 mental and physical condition and the rental value of the farm. We do not find clear, satisfactory and convincing evidence to support this characterization. At most the evidence shows Morrice made a bad bargain when, [**6] at his advanced age, he entered a long-term farm lease for substantially less cash rent than he reasonably should have been able to obtain. The unconscionability doctrine does not exist, however, to rescue parties from mere bad bargains.

Originally the doctrine was available only in equity as a defense to specific performance. When the defense rested on asserted inadequacy of consideration, specific performance would not be denied unless the inadequacy was "so gross as to shock the chancellor's conscience." *See Scott v. Habinck*, 188 Iowa 155, 162, 174 N.W. 1, 3 (1920); 5A Corbin, Contracts § 1165 (1963). It was not enough that a party made an imprudent bargain:

> People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without [**7] being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability.

Carlson v. Hamilton, 8 Utah 2d 272, 274-75, 332 P.2d 989, 990-91 (1958).

We now recognize the doctrine in law as well as equity but have accepted its limitations. A bargain is unconscionable "if it is 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.'" *Casey v. Lupkes*, 286 N.W.2d 204, 207 (Iowa 1979) (quoting *Hume v. United States*, 132 U.S. 406, 411, 10 S. Ct. 134, 136, 33 L. Ed. 393, 396 (1889)). The doctrine is recognized in Restatement (Second) of Contracts § 209 (1979) and is available as a defense under the Iowa Uniform Commercial Code. *See* Iowa Code § 554.2302 (1981). Because of its equitable purpose, neither the courts nor the legislature have attempted to give it a precise definition. *See* 15 S. Williston, A Treatise on the Law of Contracts § 1763A (3d ed. W. Jaeger 1972).

In the present case, although the issue is not free from doubt, we agree with the trial court that the conservator did not prove the lease is [**8] unconscionable.

DECISION OF COURT OF APPEALS AFFIRMED.

LEXSEE

David M. Swersky et al., Appellants-Respondents, v. Dreyer and Traub et al., Respondents-Appellants.

56136

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

219 A.D.2d 321; 643 N.Y.S.2d 33; 1996 N.Y. App. Div. LEXIS 4663

April 30, 1996, Decided
April 30, 1996, Entered

PRIOR HISTORY: [***1] Cross appeals from an order of the Supreme Court (Herman Cahn, J.), entered February 6, 1995 in New York County, which, *inter alia*, granted defendants' motions to dismiss the first, second, third and fourth causes of action, limited plaintiffs' damages on the fifth and sixth causes of action and dismissed their claims for punitive damages.

DISPOSITION: Modified, on the law, to reinstate the first four causes of action, and the demand for punitive damages against both the individual and partnership defendants, and otherwise affirmed, without costs.

COUNSEL: *Stephen M. Charme* of counsel (*Alan S. Liebman* and *Gregg H. Kanter* on the brief; *Holtzmann, Wise & Shepard,* attorneys), for appellants-respondents.

Anthony P. Colavita of counsel (*Noah Nunberg, Barbara J. Romaine* and *Peter E. Zinman* on the brief; *Dreyer & Traub, L. L. P.,* and *L'Abbate, Balkan, Colavita & Contini, L. L. P.,* attorneys), for Dreyer and Traub, respondent-appellant.

Douglas H. Flaum of counsel (*Allen Kezsbom* and *Rachel S. Fleishman* on the brief; *Fried, Frank, Harris, Shriver & Jacobson*, attorneys), for Howard Morse, respondent-appellant.

JUDGES: Nardelli [***2] and Mazzarelli, JJ., concur with Rosenberger, J. P.; Rubin and Kupferman, JJ., dissent and would affirm for the reasons stated by Cahn, J.

OPINION BY: Rosenberger, J. P.

OPINION

[*322] [**34] Rosenberger, J. P.

This action concerns plaintiffs' purchase on March 9, 1987 of 460,000 shares of the unregistered common stock of QMAX Technology Group, Inc. (QMAX) for $ 1,150,000. Defendant Howard Morse is the attorney who helped negotiate the sale on behalf of QMAX, and Dreyer and Traub is the law firm of which he is a partner. The appeal arises from defendants' motion to dismiss the complaint under CPLR 3211. The court dismissed plaintiffs' first four causes of action, dismissed [*323] plaintiffs' request for punitive damages, limited damages to actual pecuniary loss, with no recovery for lost profits, and denied both the defendants' motion and the plaintiffs' cross motion for sanctions.

We must accept the facts, as alleged in the complaint, as true, according plaintiffs the benefit of every favorable inference, and then determine whether "the facts as alleged fit within any cognizable legal theory" (*Gabriel v Therapists Unlimited*, 218 AD2d 614, 615, 631 N.Y.S.2d 34). [***3] Because plaintiffs' version of the events preceding the execution of the stock purchase agreement, and the subsequent letter agreement to extend the filing deadline, set forth a prima facie claim of fraud under both theories alleged in the complaint, the order appealed should be modified to reinstate the first four causes of action. Plaintiffs' claims for punitive damages against both defendants should also be reinstated.

The complaint alleges that in December 1986, Winfried Schuberth, the Chief Executive Officer of QMAX, approached David M. Swersky and asked whether Swersky knew of anyone who would invest one million dollars [**35] in the company. Swersky, an attorney, who had formerly served as counsel to QMAX, indicated that he might be interested in making this

219 A.D.2d 321, *; 643 N.Y.S.2d 33, **;
1996 N.Y. App. Div. LEXIS 4663, ***

investment. Schuberth asked Swersky to negotiate the specific terms with Howard Morse, the partner at Dreyer and Traub who handled the QMAX account.

Swersky thereafter negotiated the terms of his own investment in QMAX. He also negotiated investments on behalf of the other plaintiffs. He apparently informed Morse of his desire that any QMAX stock which he would purchase be filed immediately [***4] under an S-3 registration statement so that it could be immediately sold. Swersky intended to borrow money to finance his purchase, and he needed to register his shares quickly because their saleability would allow him to raise the money to repay his loan. In the month of December 1986, Morse first told Swersky that his shares could be registered immediately, then told him that the shares could not be registered under an S-3 statement until November 1987. [1]

1 Apparently an S-3 form for registering stock cannot be filed until three years after a company becomes publicly owned, which occurred here in November 1984.

To avoid this delay, Swersky asked Schuberth if he could become a QMAX officer, to become eligible to acquire that stock pursuant to the company's Employee Stock Option Plan [*324] (ESOP). Stock acquired under an ESOP by corporate officers, directors and employees could be immediately registered under an S-8 registration statement. Schuberth told Swersky that this plan was acceptable [***5] to him, and advised Swersky to work out the details with Morse.

In early December 1986, Morse informed Swersky that all the stock Swersky intended to purchase could be acquired and registered immediately pursuant to the ESOP. Then, in January 1987, Morse advised Swersky that no ESOP shares were available, and that any stock he would purchase could not be registered under an S-8 statement. On December 30, 1986, unbeknownst to Swersky and the other plaintiffs, QMAX granted Morse an option for 100,000 ESOP shares. In February 1987, Dreyer and Traub prepared an S-8 registration statement for QMAX, which Morse signed, and was filed with the Securities and Exchange Commission (SEC), which did not list the 100,000 option shares which Morse had been granted. Morse did not file a Form 3 or Form 4 with the SEC to indicate that he had acquired this option. [2]

2 17 CFR 240.16a-2 requires that directors and policy-making officers of an issuing company file a Form 3 or Form 4 to indicate the acquisition of an option. The parties disagree as to whether Morse, as Assistant Secretary and Counsel to QMAX, falls within this class. For purposes of evaluating the complaint against a CPLR 3211 motion to dismiss, we accept plaintiffs' position that Morse was a policy-making officer of QMAX.

[***6] In reliance upon Morse's misrepresentations, on March 9, 1987, plaintiffs signed a stock purchase agreement, pursuant to which they purchased the 460,000 restricted shares of QMAX common stock for $ 2.50 per share, for a total price of $ 1,150,000. The stock purchase agreement required QMAX to file an S-3 registration statement on November 10, 1987, unless Swersky advised the company otherwise in writing. During the eight-month period that plaintiffs were required to wait for registration of their shares, Morse sold a portion of the shares he had personally acquired and immediately registered, making a profit of at least $ 340,000.

On October 15, 1987, Swersky wrote to Morse, and instructed him to file the S-3 registration statement. In response to this request, Morse urged Swersky to permit a delay in the stock's registration, claiming that immediate registration would make too much QMAX stock available on the market, depressing its price. Morse told Swersky that since the price had already dropped from the mid-teens to single digits in the aftermath of October 1987's "Black Monday", any further decline would [*325] make it difficult for the company to attract investors. [***7] Morse urged Swersky to be a "team player" for the good of the company, and to wait a few months before registering his shares.

Swersky opposed the extension, and at a meeting held at the Dreyer and Traub offices in December 1987, he reminded Morse that he had borrowed money from a bank in order to purchase his shares, and that his ability to [**36] repay this debt was contingent upon transferring his QMAX stock. Morse continued to urge Swersky to be a "team player", and he represented to Swersky that none of QMAX's officers or other insiders had sold their shares prior to "Black Monday", that none had made money, and that all the investors were therefore in the same position.

Relying upon these representations, Swersky agreed by letter agreement executed December 22, 1987 to extend QMAX's deadline for registering the shares to March 31, 1988. This letter indicated to plaintiffs, for the first time, that Morse was Assistant Secretary of the company. Plaintiffs admittedly did not yet know that he was also a shareholder.

Morse did not tell Swersky at the time the letter agreement was entered into, in August 1987, that QMAX had rejected an offer which would have provided [***8] that company with $ 15 million in financing. Morse allegedly withheld this information because he had urged

the rejection of the financing offer in hopes that he could obtain similar financing from one of his former law clients. This financing, if successful, would have allowed him personally to obtain additional stock options and other benefits. Morse also withheld from Swersky information that QMAX's relationships with some major customers were rapidly deteriorating.

QMAX missed the March 31, 1988 extended filing date for registering plaintiffs' shares, while Morse represented to Swersky that he was working as expeditiously as possible to complete the necessary legal work. Around April 13, 1988, Morse filed an incomplete registration statement, which, plaintiffs allege, he knew would be rejected, for the sole purpose of misleading Swersky to believe that he was making an effort to comply with his obligations, while instead intentionally delaying the registration process until his former client's financing of QMAX could be arranged.

Morse also apparently interfered with the registration process via telephone calls to the SEC and failed to file a Form 10-k for the company, [***9] in order to facilitate the above-mentioned financing scheme. Plaintiffs' shares were never registered [*326] because the SEC began an investigation regarding alleged insider trading at QMAX. QMAX filed for bankruptcy in July 1989. Plaintiffs' shares became worthless. Their investment was lost.

The complaint alleges six claims of common-law fraud. The first and second concern the events preceding the execution of the stock purchase agreement, specifically, Morse's affirmative misrepresentation that there were no ESOP shares available (first cause of action), and his concealment of the fact that he had been granted an option for 100,000 ESOP shares which were immediately registered (second cause of action). The third and fourth causes of action allege that during the period between the execution of the stock purchase agreement and the extended March 31, 1988 deadline for registering the shares, Morse fraudulently induced plaintiffs to agree to extending the time for filing the S-3 registration statement. This was allegedly done by making misleading statements, concealing his own substantial profits, concealing his desire that the company obtain further financing from his [***10] former client, and concealing the true nature of QMAX's deteriorating business relationships with certain of its customers. Plaintiffs' fifth and sixth causes of action seek damages for Morse's postdeadline fraudulent assurances that the S-3 registration would be filed.

The first, third, and fifth claims allege fraudulent misrepresentation, the elements of which are: (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiffs reasonably relied upon the representation, and (4) the plaintiffs suffered damage as a result of their reliance (*see*, *Banque Arabe et Internationale D'Investissement v Maryland Natl. Bank,* 57 F.3d 146, 153 [2d Cir applying New York law]). The second, fourth, and sixth causes of action allege fraudulent concealment, which requires additionally setting forth that the defendant had a duty to disclose material information (*Banque Arabe et Internationale D'Investissement v Maryland Natl. Bank, supra,* at 153; *see also, Brass v American Film Technologies,* 987 F.2d 142, 152 [2d Cir]). For both theories of fraud, the more stringent CPLR 3016 (b) pleading rule requires [***11] that [**37] "the circumstances constituting the wrong shall be stated in detail" (*see*, *Ambassador Factors v Kandel & Co.,* 215 A.D.2d 305, 626 N.Y.S.2d 803).

[1] While finding that all of the other elements of fraud had been met, the trial court dismissed the first cause of action on the ground that reliance upon Morse's misstatements was unjustified. The court applied the principle that "[i]f the facts [*327] represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations (*Danann Realty Corp. v Harris,* 5 N.Y.2d 317, 322, 184 N.Y.S.2d 599, 157 N.E.2d 597)", to conclude that based upon Swersky's sophistication, his former relationship as counsel to QMAX, his access to Schuberth, and the availability of the 10-k filed by QMAX in June 1986, he had the means to divine that ESOP shares were available in December of 1986.

This issue should not have been [***12] resolved as a matter of law. The record reveals that Swersky had access to the 10-k filed by QMAX in June of 1986, and the S-8 filed by the company in February 1987. However, although the June 1986 10-k indicated that Morse had been granted an option, it did not provide any information about the availability of ESOP shares in December of 1986. In addition, the 100,000-share option which Morse had been granted was not listed on the February 1987 S-8 registration statement.

The value of Swersky's access to Schuberth is also questionable. It is unclear from the present record how much information regarding the specifics of the availability of ESOP shares Schuberth had, and, given the alignment of economic interests, how candid he would have been with any information he did have. Since these are issues which require resolution by the trier of fact, summary dismissal of the first cause was improper (*see*, *Century 21 v Woolworth Co.,* 181 A.D.2d

620, 582 N.Y.S.2d 101; *Black v Chittenden,* 69 N.Y.2d 665, 669, 511 N.Y.S.2d 833, 503 N.E.2d 1371).

The second cause of action should similarly have been sustained. Although the arm's length nature of this transaction negates any [***13] alleged duty to disclose based upon a fiduciary relationship (*see, e.g., Republic of Croatia v Trustee of Marquess of Northampton 1987 Settlement,* 203 A.D.2d 168, *lv denied* 84 N.Y.2d 805), there is still an outstanding issue as to whether Morse had a duty to disclose his December 1986 stock option purchase as a matter peculiarly within his knowledge. Under the "special facts" doctrine, a duty to disclose arises " 'where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair' " (*Beneficial Commercial Corp. v Glick Datsun,* 601 F. Supp. 770, 773 [SD NY], quoting *Chiarella v United States,* 445 U.S. 222, 248, 63 L. Ed. 2d 348, 100 S. Ct. 1108; *Ferer & Sons v Chase Manhattan Bank,* 731 F.2d 112, 123 [2d Cir]). [*328] Because there are outstanding issues as to whether the disparity in the level of information available to Morse, but not to Swersky, places this case within the ambit of the "special facts" doctrine, and, as discussed with respect to the first cause of action, whether plaintiffs could have through "the exercise of ordinary intelligence" independently ascertained that Morse had acquired [***14] his December 1986 option, the second cause of action should be reinstated (*Century 21 v Woolworth Co., supra,* at 625; *Black v Chittenden, supra,* at 669).

There are also outstanding factual issues pertaining to the third and fourth causes of action. The trier of fact must determine the reasonableness of Swersky's reliance upon Morse's representations that none of QMAX's officers or insiders had sold their stock during the summer and fall of 1987, as well as whether Morse's concealment of his own financial transactions and interests was material to Swersky's decision to execute the letter agreement (*Allen v Westpoint-Pepperell, Inc.,* 945 F.2d 40, 45 [**38] ["A fact may not be dismissed as immaterial unless it is 'so obviously unimportant ... that reasonable minds could not differ on the question of (its) importance' (citations omitted)]"). The trial court should not have resolved these issues as a matter of law.

[2] Plaintiffs' claims for punitive damages were also improperly dismissed. Punitive damages are available in a tort action where the wrongdoing is intentional or deliberate, has circumstances of aggravation or outrage, has a fraudulent or evil motive, [***15] or is in such conscious disregard of the rights of another that it is deemed willful and wanton (*see*, *Prozeralik v Capital Cities Communications,* 82 N.Y.2d 466, 479, 605 N.Y.S.2d 218, 626 N.E.2d 34, citing Prosser and Keeton, Torts § 2, at 9-10 [5th ed]). It is for the jury to decide whether Morse's direct dealings with Swersky were so reprehensible as to warrant punitive damages (*Loughry v Lincoln First Bank,* 67 N.Y.2d 369, 378, 502 N.Y.S.2d 965, 494 N.E.2d 70; *AT&T Information Sys. v McLean Bus. Servs.,* 175 A.D.2d 652, 653, 572 N.Y.S.2d 582; *see also, Nardelli v Stamberg,* 44 N.Y.2d 500, 503, 406 N.Y.S.2d 443, 377 N.E.2d 975 ["(w)hether to award punitive damages in a particular case, as well as the amount of such damages, if any, are primarily questions which reside in the sound discretion of the original trier of the facts (citations omitted)"]). That the harm alleged might not have been aimed at the general public does not alter this result (*Giblin v Murphy,* 73 N.Y.2d 769, 772, 536 N.Y.S.2d 54, 532 N.E.2d 1282).

Analogizing this law firm partnership to a corporate employer, against whom New York courts have allowed awards of punitive damages, "where [***16] management has authorized, [*329] participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit servant [citations omitted], or the wrong was in pursuance of a recognized business system of the entity [citation omitted]" (*Loughry v Lincoln First Bank,* 67 N.Y.2d 369, 378, 502 N.Y.S.2d 965, 494 N.E.2d 70, *supra*), we would also sustain the claim for punitive damages against Dreyer and Traub. Although the partnership may not have explicitly ratified Morse's activities on behalf of their client QMAX, the trial court properly found that because the alleged misconduct was conducted within the scope of the partnership's business, the firm may be held liable to the same extent as the individual defendant (Partnership Law § 24; *see also*, *Barnhard v Barnhard,* 179 A.D.2d 715, 578 N.Y.S.2d 615; *Clients' Sec. Fund v Grandeau,* 72 N.Y.2d 62, 67, 530 N.Y.S.2d 775, 526 N.E.2d 270). An award of punitive damages is appropriate based upon a jury's determination that such an award would advance the goal of deterring wrongful conduct by motivating an employer, or, here, a partnership, adequately to supervise its employees, [***17] particularly those whose actions may reflect what has become known as the "corporate culture" and implicate the " 'institutional conscience' " (*Aldrich v Thomson McKinnon Sec.,* 589 F. Supp. 683, 686, *vacated on other grounds* 756 F.2d 243), and to take preventative measures (*Loughry v Lincoln First Bank,* 67 N.Y.2d 369, 377, 502 N.Y.S.2d 965, 494 N.E.2d 70, *supra*).

Accordingly, the order of the Supreme Court, New York County (Herman Cahn, J.), entered on or about February 6, 1995, should be modified, on the law, to reinstate the first four causes of action and the demand for punitive damages against both the individual and partnership defendants, and otherwise affirmed, without costs.

Nardelli and Mazzarelli, JJ., concur with Rosenberger, J. P.; Rubin and Kupferman, JJ., dissent and would affirm for the reasons stated by Cahn, J.

Order, Supreme Court, New York County, entered on or about February 6, 1995, modified, on the law, to reinstate the first, second, third and fourth causes of action and the demand for punitive damages against both the individual and partnership defendants, and otherwise affirmed, without costs.

LEXSEE

TAPESTRY VILLAGE PLACE INDEPENDENT LIVING, L.L.C., Plaintiff-Appellant/Cross-Appellee, vs. VILLAGE PLACE AT MARION, L.P., DEVELOPMENT GROUP, L.L.C., THOMAS E. MILLER, CRAIG R. MILLER, and DOUGLAS V. MILLER, Defendants-Appellees/Cross-Appellants.

No. 9-112 / 08-1018

COURT OF APPEALS OF IOWA

2009 Iowa App. LEXIS 331

May 6, 2009, Filed

NOTICE:

NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNTIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION OF THE COURT OF APPEALS MAY NOT BE CITED BY A COURT OR BY A PARTY IN ANY OTHER ACTION.

SUBSEQUENT HISTORY: Reported at Tapestry Vill. Place Indep. Living, L.L.C. v. Vill. Place at Marion, L.P., 771 N.W.2d 651, 2009 Iowa App. LEXIS 1093 (Iowa Ct. App., 2009)

PRIOR HISTORY: [*1]

Appeal from the Iowa District Court for Linn County, Patrick R. Grady and James H. Carter, Judges. Buyer appeals and sellers cross-appeal from district court rulings in an action arising from the sale of an independent living facility.

DISPOSITION: AFFIRMED ON BOTH APPEALS.

COUNSEL: Tiernan T. Siems and Matthew V. Rusch of Erickson & Sederstrom, P.C., Omaha, Nebraska, for appellant.

Paul D. Burns of Bradley & Riley, P.C., Iowa City, and Michael C. Flom and Prairie A. Bly of Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, Minnesota, for appellees.

JUDGES: Considered by Vaitheswaran, P.J., and Doyle and Mansfield, JJ.

OPINION BY: DOYLE

OPINION

DOYLE, J.

Tapestry Village Place Independent Living, L.L.C. (Tapestry) appeals and Village Place at Marion, L.P. (Village Place), Development Group, L.L.C., Thomas Miller, Craig Miller, and Douglas Miller cross-appeal from district court rulings in an action arising from the sale of an independent living facility. We affirm the judgment of the district court.

I. Background Facts and Proceedings.

In 1988 Village Place and its general partner, Development Group, began construction on an eighty-unit independent living facility for senior citizens. Thomas Miller was the president of Village Place and [*2] Development Group, and his brothers, Craig and Douglas Miller, were the companies' vice presidents. Construction on the building was completed in 1990.

Soon thereafter, problems arose with the quality of the workmanship performed by the general contractor and its subcontractors. After the building's "first winter season," the siding "became all wavy and . . . wrinkled" because it was improperly applied. The windows on the "front facade of the building over the entryway . . . . crack[ed] for no apparent reason." All of the siding on the building had to be replaced as did the foyer widows and framing.

Beginning in 1994 or 1995, the residents of the facility began complaining about problems with the bay windows in their rooms. Some of the windows were difficult to close and let water, air, and insects inside. Maintenance personnel routinely fixed those problems

by manually closing the windows from the outside, replacing window "cranks," and filling gaps in the windows with insulation or caulk. Residents would also place towels on the counters around the windows "trying to keep the breeze down." Cindy Cason, the executive director of the facility, learned about the ongoing problems with [*3] the bay windows shortly after she began her employment in 2001. She regularly reported those problems to Steve Yurick, the corporate property manager for the Millers. Craig Miller also heard about some of the maintenance issues with the bay windows during his annual inspections of the facility.

Tapestry became interested in purchasing the facility in November or December 2004 after learning it was on a list of "troubled properties." Ryan Durant, a project coordinator for a property management company affiliated with Tapestry, visited the property on five or six occasions. Yurick told Cason to show Durant the facility and answer his questions truthfully. Cason, however, understood she was not to do anything that would jeopardize the sale. She therefore refrained from volunteering any information about problems with the bay windows.

After several months of negotiation, Tapestry agreed to purchase the property from Village Place and Development Group for $ 3,142,250. The parties entered into a purchase agreement, which was signed by Thomas Miller on behalf of Village Place and Development Group, on May 6, 2005. The agreement provided Tapestry was purchasing the property without "relying [*4] on any representation, warranty or promise by or on behalf of Seller" and in its "'as is' and 'where is' condition, and 'with all faults.'" Despite that provision, the agreement further provided that "[t]o Seller's knowledge . . . the Improvements located on the Real Property . . . are in good condition and repair, considering their age, ordinary wear and tear excepted, and are fit for their intended use in the ordinary course of business." The agreement afforded Tapestry the opportunity prior to closing "to perform all such tests, investigations and analyses concerning the purchased assets, including, without limitation, the real property and the fixed assets, and the independent living facility as it deems necessary or desirable."

During Tapestry's due diligence investigation, Durant discovered problems with the roof, and the purchase price was reduced to $ 3,092,250. He did not, however, discover any problems with the bay windows in his inspections of the facility, nor was he informed of any by the sellers or their representatives. He also did not learn about the problems encountered by the defendants when they constructed the building.

Tapestry began renovating the facility soon [*5] after it took possession of the property. Its renovations revealed significant water damage near the bay windows throughout much of the facility. Removal of siding around the windows exposed deteriorated and rotten sheathing, framing, and insulation. Durant was informed by the contractor in charge of the renovations that all of the bay windows in the facility needed to be replaced, which he estimated would cost approximately $ 466,232.

Tapestry sued the defendants in June 2006 for fraudulent misrepresentation and concealment, negligent misrepresentation, negligence, and breach of contract. The defendants filed a motion for summary judgment, which was granted in part by the district court. The court determined that Tapestry's negligence claims were barred by the economic loss doctrine and dismissed those claims. It denied the remainder of the defendants' motion, finding genuine issues of material fact existed as to Tapestry's claims for fraud and breach of contract.

The case proceeded to trial before the district court without a jury. After hearing the parties' evidence, the court dismissed all of the claims against the Millers individually. It also dismissed the fraud claims against [*6] Village Place and Development Group, but found in favor of Tapestry on its breach of contract claim against those entities. It determined that "the improvements on the real property were not as warranted" in the parties' purchase agreement due to the condition of the bay windows throughout the facility and that Tapestry was accordingly entitled to damages in the amount of $ 175,000 plus interest.

Tapestry appeals. It claims the district court erred in (1) dismissing its fraudulent misrepresentation and negligence claims against the defendants, (2) determining it was not entitled to punitive damages, (3) finding the Millers were not personally liable under the purchase agreement, and (4) calculating its damages. The defendants cross-appeal, claiming the damage award was not supported by substantial evidence.

II. Scope and Standards of Review.

We review the district court's summary judgment ruling on Tapestry's negligent misrepresentation claim for the correction of errors at law. Iowa R. App. P. 6.4; *Faeth v. State Farm Mut. Auto. Ins. Co.,* 707 N.W.2d 328, 331 (Iowa 2005). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and [*7] affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Faeth,* 707 N.W.2d at 331.

We likewise review the court's ruling on Tapestry's fraud and breach of contract claims in this law action for

the correction of errors at law. Iowa R. App. P. 6.4; *Flom v. Stahly,* 569 N.W.2d 135, 139 (Iowa 1997). Because those claims were tried to the district court without a jury, the "court's findings of fact have the effect of a special verdict and are binding if supported by substantial evidence." *Equity Control Assocs., Ltd. v. Root,* 638 N.W.2d 664, 670 (Iowa 2001). We view the evidence in a light most favorable to the court's ruling and construe its findings broadly and liberally in favor of the judgment. *Id.* We are not, however, bound by the court's legal conclusions. *Id.*

III. Discussion.

A. Fraudulent Misrepresentation.

Tapestry first claims the district court erred in dismissing its fraud claims based on defendants' failure to inform Tapestry about the defects in the bay windows. We reject this claim.

In order to establish fraudulent misrepresentation, Tapestry was required to prove the following by a [*8] preponderance of clear, convincing, and satisfactory evidence: "(1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent; (6) justifiable reliance; and (7) resulting injury." *Smidt v. Porter,* 695 N.W.2d 9, 22 (Iowa 2005). "Concealment of or failure to disclose a material fact can constitute fraud in Iowa." *Cornell v. Wunschel,* 408 N.W.2d 369, 374 (Iowa 1987). However, in order for silence to be an actionable fraud, it

> must relate to a material matter *known* to the party and which it is his legal duty to communicate to the other contracting party, whether the duty arises from a relation of trust, from confidence, from inequality of condition and knowledge, or other attendant circumstances.

Wilden Clinic, Inc. v. City of Des Moines, 229 N.W.2d 286, 293 (Iowa 1975) (emphasis added).

Here, the district court found

> [t]he cause of the defective windows on which [Tapestry's fraud] claims are based was insufficient structural support to hold the windows in place. This condition was concealed by the siding and was only discovered when siding was removed for a remodeling project that occurred after the sale. The evidence does not support a finding that the sellers (Village Place [*9] and Development Group) were aware of the insufficient support or the concealed deterioration underlying the windows at the time of the sale. Nor were the other named Defendants aware of those conditions. The Miller Brothers . . . had been made aware of the visible manifestations of the concealed deterioration, i.e., sagging windows that would not close and the resulting entry of rain and cold air. But they could have reasonably believed that these visible deficiencies had been adequately repaired and the facility was fit for its intended use. The Court finds that their representations were not knowingly false or made with an intent to deceive.

We conclude the court's findings are supported by substantial evidence and its application of law correct.

The expert witness retained by Tapestry, architect David Brost, testified that the deterioration of the bay window structures was apparent only after he performed his "destructive testing," which involved removal of siding. Other contractors employed by Tapestry to repair the bay windows testified similarly, with one stating, "The more we tore into it . . . the more [we discovered] it's going to be worse than what we think." The defendants' [*10] expert witness, David Unzeitig, confirmed that "the only way we knew there was any damage happening in the bay window area . . . was because the architect, Dave Brost, hired a contractor to take all the siding off."

In *Burnett v. Hensley,* our supreme court stated,

> If there be a latent defect, not ascertainable on inspection, *of which the seller had knowledge,* common honesty requires that he tell the purchaser of the defect. But if knowledge of this defect be open to the purchaser, no fraud is perpetrated by the seller in remaining silent. Should he, however, make statements regarding the condition of the thing sold with the intent to divert the eye or obscure the observation of the purchaser, he will be guilty of fraud, and the law will relieve the purchaser. Even in such cases, in an action at law for damages, *it must be shown that defendant knew of the defect,* and that he made the statements or concealed the defects with intent to defraud the purchaser.

118 Iowa 575, 578-79, 92 N.W. 678, 679 (1902) (emphasis added) (citations omitted).

As the district court found, there is no evidence the defendants knew about the deterioration of the structural support of the bay windows even though [*11] their employees did know residents experienced problems with the windows. Nor is there any evidence the defendants purposely concealed the defects with the intent to defraud Tapestry, especially in light of Tapestry's ability under the parties' purchase agreement to inspect the property in whatever manner it chose. *See Christy v. Heil,* 255 Iowa 602, 607, 123 N.W.2d 408, 411 (1963) ("Whether the purchaser should be precluded from recovery because of his investigation or opportunity to investigate is ordinarily for the trier of fact.").

We therefore affirm the district court's dismissal of Tapestry's fraud claims against Village Place and Development Group. In so doing, we also affirm its dismissal of Tapestry's request for punitive damages, which was based on the defendants' supposed fraudulent misrepresentations and concealment of the defects in the bay windows. *See Wolf v. Wolf,* 690 N.W.2d 887, 893 (Iowa 2005) ("Punitive damages are only appropriate when a tort is committed with 'either actual or legal malice.'" (citation omitted)); *see also Berryhill v. Hatt,* 428 N.W.2d 647, 656 (Iowa 1988) (stating punitive damages, which are "always discretionary," cannot be based on breach of contract [*12] alone; rather, "the breach must also constitute an intentional tort, or other wrongful act, committed with legal malice, that is with willful or reckless disregard for another's rights"). This brings us to Tapestry's next assignment of error: whether the district court erred in dismissing its negligent misrepresentation claim on summary judgment.

B. Negligent Misrepresentation.

The district court determined the economic loss doctrine as articulated in *Determan v. Johnson,* 613 N.W.2d 259 (Iowa 2000), applied to bar Tapestry's negligent misrepresentation claim, which sought recovery for the cost to repair the damage caused by the defective bay windows in the facility it purchased from the defendants. We agree.

The economic loss doctrine is a "generally recognized principle of law that plaintiffs cannot recover in tort when they have suffered only economic harm." *Richards v. Midland Brick Sales Co.,* 551 N.W.2d 649, 650 (Iowa Ct. App. 1996); *see also Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.,* 345 N.W.2d 124, 128 (Iowa 1984) (adopting rule that a plaintiff "cannot maintain a claim for purely economic damages arising out of [a] defendant's alleged negligence"). Our supreme court [*13] most recently addressed the doctrine in *Determan,* in which a purchaser of a home sued the sellers "under several different negligence theories" after discovering significant structural problems in the home. *Determan,* 613 N.W.2d at 260-61. In finding the plaintiff could not recover under tort law, the court stated that where the loss relates to a consumer's "disappointed expectations due to deterioration, internal breakdown or non-accidental cause, the remedy lies in contract." *Id.* at 262. This is so because "contract law protects a purchaser's expectation interest that the product received will be fit for its intended use." *Tomka v. Hoechst Celanese Corp.,* 528 N.W.2d 103, 107 (Iowa 1995); *see also Richards,* 551 N.W.2d at 651 ("Purely economic losses usually result from the breach of a contract and should ordinarily be compensable in contract actions, not tort actions.").

We believe the district court correctly determined that *Determan* controls the result here. Tapestry's negligent misrepresentation claim is clearly based on its disappointed expectations under the parties' purchase agreement due to the deterioration of the bay windows discovered during its remodel of the facility. *See* [*14] *Determan,* 613 N.W.2d at 262. The damages sought by Tapestry to repair the bay windows do not "extend beyond the product itself." *Id.* (stating at a minimum "the damage for which recovery is sought must extend beyond the product itself" in order to be compensable in tort); *see also Flom,* 569 N.W.2d at 141 (finding plaintiff's claim was contractual in nature because "the harm alleged was to the object of the contract (the house) and not to their persons or other property"). In addition, Tapestry does not seriously contest the district court's application of the economic loss doctrine on appeal. Instead, it simply asserts that it established the elements of a negligent misrepresentation claim at trial. We therefore deny this claim and affirm the district court's dismissal of Tapestry's cause of action for negligent misrepresentation.

C. Personal Liability of Millers.

Tapestry next claims the district court erred in determining Thomas, Craig, and Douglas Miller were not exposed to personal liability under the purchase agreement and dismissing its claims against them. We conclude otherwise.

The purchase agreement was entered into by Village Place and Development Group as the sellers and Tapestry [*15] as the purchaser. Although Thomas Miller signed the agreement as the president of both Village Place and Development Group, none of the Millers signed the agreement in their individual capacities. Tapestry accordingly seeks to impose liability on the Millers by arguing they engaged in tortious

activity by making fraudulent misrepresentations about the condition of the building. [1]

> 1 We reject Tapestry's alternative argument that the purchase agreement between the Millers' corporate entities and Tapestry "reflects additional contractual relationships created with the Miller Brothers, individually." Tapestry's argument is founded on the following provision in the agreement:
>
> > the term 'knowledge' and 'aware' . . . when used with respect to Seller or Partner, means the actual knowledge of Thomas E. Miller, Craig R. Miller, and Douglas V. Miller, after discussion with Todd Witcraft, Chief Financial Officer of Apprize, Inc., Steve Yurick, Director, Apprize Property Management, Inc., and the on-site manager of the Independent Living Facility.
>
> There is no merit to Tapestry's assertion that this provision represents a separate contract between Tapestry and the Millers individually. *See generally* Horsfield Constr. Inc. v. Dubuque County, 653 N.W.2d 563, 570-71 (Iowa 2002) [*16] (discussing factors bearing on existence of contract).

A member or manager of a limited liability company is not personally liable for acts or debts of the company *solely* by reason of being a member of manager. *See* Iowa Code § 490A.603 (2005); *Estate of Countryman v. Farmers Coop. Ass'n,* 679 N.W.2d 598, 603 (Iowa 2004). The same is true for limited partners in a limited partnership. *See* Iowa Code § 488.303. However, "under general agency principles, corporate officers and directors can be liable for their torts even when committed in their capacity as an officer." *Estate of Countryman,* 679 N.W.2d at 603 (applying same principle to members or managers of a limited liability company).

There is no evidence in the record to support Tapestry's assertion that any of the Millers participated in tortious conduct, as we indicated in our earlier discussion denying Tapestry's fraudulent misrepresentation claim against Village Place and Development Group. The district court's dismissal of Tapestry's claims against the Millers individually is thus affirmed.

D. Damages.

We come now to the heart of the parties' disagreement on appeal: whether the district court erred in its award of damages to Tapestry. [*17] In awarding Tapestry damages, the court determined:

> [D]amages for a breach of express warranty in the sale of physical assets may, in proper cases, be measured by the cost of correcting the deficiencies. But this is only true to the extent that such corrections enhance the value of the property to the value that was warranted. The Defendants correctly argue that the restorative costs proposed by [Tapestry] as "benefit of the bargain" damages would enhance the value of the facility far beyond its warranted condition. This does not mean, however, that [Tapestry] should not recover some damages . . . . Clearly, the window problems have rendered the assets that were purchased of less value than they would have had if the windows had been in good condition. Based on the evidence presented, damages must be approximated by the trier-of-fact. The Court's best judgment in this regard is that the condition of the windows reduced the value of the property by no less than $ 175,000 below what it would have been had the windows been in acceptable condition.

Tapestry claims the court erred in failing to award it damages based on the cost to repair the bay windows, which it asserted at trial would [*18] be $ 466,232. We do not agree.

Ordinarily, in a breach of express warranty action such as this, the appropriate measure of damages is "the difference between value of the goods as they were and value as they would have been had they answered to the warranty." *Dailey v. Holiday Distrib. Corp.,* 260 Iowa 859, 876, 151 N.W.2d 477, 489 (1967); *see also* Iowa Code § 554.2714(2). But, "[t]he 'ultimate purpose' behind the allowance of damages is to place the injured party in the position he or she would have occupied if the contract had been performed." *Macal v. Stinson,* 468 N.W.2d 34, 36 (Iowa 1991). Thus,

> [w]hen the loss in value to the injured party cannot be proved with sufficient certainty, a breach resulting in defective construction may entitle the injured party to recover damages based on "the reasonable cost of . . . remedying the

> defects if that cost is not clearly disproportionate to the probable loss in value . . . ."

Flom, 569 N.W.2d at 142 (quoting Restatement (Second) of Contracts § 348(2)(b) (1979)). Tapestry relies on *Flom* in support of its claim that the proper measure of damages was the cost to repair the bay windows.

Flom, however, involved a newly constructed house with significant [*19] structural defects. Here, Tapestry purchased a sixteen-year-old building and sought damages based on the cost of replacing the old windows in that building with new windows. We thus agree with the district court that "the restorative costs proposed by [Tapestry] as 'benefit of the bargain' damages would enhance the value of the facility far beyond its warranted condition." *See Flom,* 569 N.W.2d at 142 (stating a party may recover the reasonable cost of remedying the defects "if that cost is not clearly disproportionate to the probable loss in value"); *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.,* 579 N.W.2d 823, 831 (Iowa 1998) (noting a party is "not entitled to be placed in a better position than he would have been in if the contract had not been broken"). This is especially so in light of the fact that Tapestry purchased the facility for much less than its appraised value as of 2004, which was $ 3,665,000.

Moreover, "[i]n defective construction cases, damages may include diminution in value, cost of construction, and completion in accordance with the contract, or loss of rentals." *R.E.T. Corp. v. Frank Paxton Co.,* 329 N.W.2d 416, 421 (Iowa 1983). Hence, in *Hansen v. Andersen,* 246 Iowa 1310, 1315, 71 N.W.2d 921, 924 (1955), [*20] the court determined that cost-of-repair damages in a defective construction case were not appropriate where "there would have to be substantial changes to comply with [the] claimed contract." It concluded the "proper measure of damage would be the difference between the value of the building as it is and the value as it would have been if made under the provisions of the claimed agreement." *Hansen,* 246 Iowa at 1316, 71 N.W.2d at 924 ("[W]here the defective material has become an inherent part of the building so that the defect cannot be remedied except by taking down and doing over some substantial portion of the work . . . the amount allowable . . . is the amount which the building, by reason of the defect, is worth less than it would have been if constructed in entire conformity to the contract.").

The bid Tapestry received to repair the defective bay windows included installation of new siding on the entire building, drywall, paint, framing, shingling, and new gutters. The cost of labor and material in making these changes and others is substantial. We thus do not believe the district court erred in denying Tapestry's claimed cost-of-repair damages and instead awarding it $ 175,000 [*21] plus interest, which represented its "best judgment" as to the diminution in value caused by the faulty bay windows.

This leads us to the defendants' claim on cross-appeal: whether Tapestry presented sufficient evidence of its damages. The party seeking damages has the burden to prove them. *Sun Valley Iowa Lake Ass'n v. Anderson,* 551 N.W.2d 621, 641 (Iowa 1996). However, "[t]here is a distinction between proof that a party has suffered damages and proof regarding the amount of those damages." *Id.* "If the record is uncertain and speculative whether a party has sustained damages, the fact finder must deny recovery." *Id.* "But if the uncertainty is only in the *amount* of damages, a fact finder may allow recovery provided there is a reasonable basis in the evidence from which the fact finder can infer or approximate the damages." *Id.* (emphasis added).

The defendants do not claim the record is uncertain as to whether Tapestry sustained damages. Rather, they assert Tapestry did not present any evidence as to the diminution in value to the facility caused by the defects in the bay windows. We conclude, however, that there is a reasonable basis in the evidence from which the district court could [*22] infer or approximate the damages as it did given the 2004 appraisal value, the amount Tapestry paid for the building, and its claimed restorative costs. The court's award of $ 175,000 was within the range of that evidence. *See Hawkeye Motors, Inc. v. McDowell,* 541 N.W.2d 914, 917-18 (Iowa Ct. App. 1995) (stating the determination of damages in a bench trial "ordinarily lies within the sound discretion of the trial court" and an "award of damages within the range of the evidence will not be disturbed on appeal").

IV. Conclusion.

We conclude the district court did not err in dismissing Tapestry's fraud claims against Village Place and Development Group and denying its request for punitive damages. We further conclude the court correctly determined the economic loss doctrine barred Tapestry's negligent misrepresentation claim. The court was also correct in finding the Millers were not subject to personal liability and dismissing Tapestry's claims against them. Finally, we conclude the court did not apply an incorrect measure of damages in this case and its award of damages was supported by substantial evidence. The judgment of the district court is therefore affirmed.

V. Postscript.

Appellees [*23] point to a few violations of the rules of appellate procedure made by Tapestry Village in its brief. The observations may be true, but "whose house is of glass, must not throw stones at another." [2] Appellees' brief also violates the applicable rules of appellate procedure. Iowa Rule of Appellate Procedure 6.16(1) provides that a brief's typed matter be "6 by not less than 8 1/8 inches nor more than 9 1/4 inches." The lines of typewritten text in appellees' fifty-page brief measure six and one-half inches. Exceeding the maximum width by one-half inch may seem a small matter, but appellees have in effect filed an over-length brief without permission.

2 G. Herbert, *Jacula Prudentum,* No. 196 (1651).

AFFIRMED ON BOTH APPEALS.

LEXSEE

LINDA THURBER, Plaintiff, v. UNITED PARCEL SERVICE, INC., Defendant.

No. 2:05-cv-159

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

2007 U.S. Dist. LEXIS 76955

October 15, 2007, Decided
October 16, 2007, Filed

COUNSEL: [*1] For Linda Thurber, Plaintiff: Thomas C. Bixby, LEAD ATTORNEY, McCarty, Buehler & Bixby, P.C., Brattleboro, VT.

For United Parcel Service, Inc., Defendant: Barry J. Waters, LEAD ATTORNEY, Murtha Cullina LLP, New Haven, CT; Nicole Tuman, LEAD ATTORNEY, Murtha Cullina LLP, Stamford, CT; Timothy E. Copeland, Jr., LEAD ATTORNEY, Downs Rachlin Martin PLLC, Brattleboro, VT.

For Local 597 Chauffeurs, Teamsters, Warehousemen and Helpers Union, Ronald Rabideau, in his individual capacity and in his capacity as Union Representitive, Defendants: Hugh J. Beins, LEAD ATTORNEY, Washington, DC; Richard T. Cassidy, LEAD ATTORNEY, Hoff Curtis, Burlington, VT.

JUDGES: William K. Sessions III, Chief Judge.

OPINION BY: William K. Sessions III

OPINION

OPINION AND ORDER

Linda Thurber brought suit against United Parcel Service ("UPS") on April 28, 2005, in the Vermont Superior Court in Wyndham County, Vermont. The action was removed to this Court on June 7, 2005, and original jurisdiction was established pursuant to 28 U.S.C. § 1331. Plaintiff's amended complaint asserts six claims: breach of contract (Count I); wrongful termination (Count II); "bad faith" (Count III); breach of fiduciary duty (Count IV); violation of 21 V.S.A. § 643b (Count [*2] V); and violation of 21 V.S.A. § 495 (Count VI). UPS has moved for summary judgment on all counts. For the reasons set forth below, Defendant's Motion for Summary Judgment (Doc. 79) is GRANTED.

I. FACTS

Thurber began working at UPS on July 25, 1988, as a "preloader/splitter", a position in which she remained throughout the entirety of her employment with UPS. Thurber worked three and one-half hour morning shifts, Mondays through Fridays, earning approximately $ 18,000 annually. During her tenure, Thurber was a member of a bargaining unit represented by Chauffeurs, Teamsters, & Helpers, Local No. 597 (the "Union"). The terms and conditions of her employment were governed by the Collective Bargaining Agreement ("CBA") between the Union and UPS, and Thurber was aware that a union representative was available to whom she could refer any employment issues.

The Brattleboro facility, where Thurber worked, is dedicated to shipping and receiving packages. Packages are brought to the facility early in the morning and are sorted and packed on to UPS trucks. Drivers then distribute packages to various local destinations. Later in the evening, trucks return to the center, and more packages are unloaded [*3] and sorted. During the day, the facility is nearly empty and almost no activity is conducted except for pick-up by customers at the customer service window.

UPS establishes essential requirements for all positions. With one exception, union positions at the Brattleboro facility specifically require that employees are able to lift and/or handle packages weighing up to seventy pounds. The only position that does not explicitly include such a lifting requirement, that of shift driver, nonetheless requires that employees be able to "handle weight in excess of 70 pounds for short durations on an infrequent basis." (Tanguay Aff. at 5-h.)

Thurber's job as a preloader/splitter required her to stand at the head of a conveyor belt and to orient boxes entering the facility on the belt in such a way that the label could be read by other preloaders. Thurber would

then carry boxes from the belt and load them into various delivery trucks based on the packages' destination address.

On February 11, 2003, as she was leaving work at the end of her shift, Thurber was struck in the back of the legs by a co-worker's automobile in the UPS parking lot. She was taken to Brattleboro Memorial Hospital and was discharged [*4] later that day. The treating physician instructed Thurber to wear a neck brace, take Tylenol, and rest. The physician also instructed Thurber not to return to work for three to four weeks.

Thurber subsequently filed a worker's compensation claim. Based on this claim, she received approximately $ 74,000 in benefits, including direct disability payments as well as provision of vocational rehabilitation benefits and medical expenses. The claims were processed and paid out by Liberty Mutual, UPS's Workers' Compensation carrier. UPS is not self-insured and has not been during any of the years relevant for this case, and Liberty Mutual has been UPS's Workers' Compensation insurer since at least 2000.

Thurber returned to work in a light-duty capacity on March 17, 2003. She worked for two weeks, three mornings per week. At the end of this period, she was instructed by her doctor not to lift more than 10 pounds above shoulder-level. On April 18, 2003, Thurber's orthopedic surgeon relaxed her lifting restrictions to 50 pounds. Thurber, however, continued to experience difficulty lifting and consulted a second surgeon. On May 13, 2003, the second surgeon, Dr. Chard, diagnosed tendonitis in Thurber's [*5] left shoulder and restricted her to lifting no more than ten pounds.

Thurber returned to UPS working five mornings a week in a light-duty capacity through July 1, 2003. At this time, Dr. Chard instructed her to "severely curtail her work activities." After July 1, 2003, Thurber never returned to work at UPS. On November 21, 2003, she had a Functional Capacity Examination at which Dr. Chard determined that she had reached a maximal medical endpoint. He reported that Thurber had a lifting restriction of 25 pounds and that she continued to suffer from left shoulder tendonitis.

Thurber began seeing a third orthopedic surgeon, Dr. McLarney, in 2005. While in Dr. McLarney's care, Thurber underwent arthroscopic surgery on her left shoulder on January 4, 2006. Dr. McLarney determined that Thurber had an anterior labral tear in her left shoulder. At that time, Dr. McLarney instructed Thurber to refrain from lifting more than five pounds and not to engage in any weighted overhead lifting. Over the next six months, these restrictions were somewhat eased. On July 11, 2006, Dr. McLarney concluded that Thurber had reached her maximal medical endpoint. At this point, Dr. McLarney removed lifting restrictions, [*6] instructing Thurber that she could lift as much at waist level as she could tolerate. However, Dr. McLarney recommended that she permanently refrain from "significant weighted overhead lifting."

Thurber has advised UPS that she is interested in a Union position. However, she has never identified any particular positions with UPS for which she would like to be considered nor any positions for which she is qualified. UPS has consistently maintained that there have not been any bargaining-unit positions available at its facilities that Thurber could perform based on her restrictions.

II. SUMMARY JUDGMENT STANDARD

The Court will grant a motion for summary judgment if no genuine issue of material fact exists and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. *Salahuddin v. Goord,* 467 F.3d 263, 272 (2d Cir. 2006) (citing *D'Amico v. City of New York,* 132 F.3d 145, 149 (2d Cir. 1998)). In deciding whether a genuine issue of material fact exists, the Court interprets all ambiguities and draws all inferences in favor of the non-moving party. *Id.* (citing *Ford v. McGinnis,* 352 F.3d 582, 587 (2d Cir. 2003)). *See also* Fed. R. Civ. P. 56(c) ("The judgment [*7] sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.").

"The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Once the movant has established that there is no material issue of fact and that it is entitled to judgment as a matter of law, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." *First Nat'l Bank v. Cities Serv. Co.,* 391 U.S. 253, 270, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968). Mere allegations or denials in the non-movant's pleadings will not meet this burden. *Anderson,* 477 U.S. at 248.

III. DISCUSSION

A. Counts I and IV

Thurber has brought six claims against UPS; Counts I and IV allege breach of contract and breach of fiduciary duties respectively. UPS has moved for summary judgment on these counts arguing, [*8] first, that both

claims are preempted under § 301(a) of the Labor Management and Relations Act (LMRA), second, that both claims lack merit, and third, that both claims are barred by the statute of limitations. The Court has already had occasion to consider the parties' arguments on preemption with respect to Count I in its opinion and order denying Thurber's motion to remand. (Doc. 26.) In that opinion, the Court found that Thurber's breach of contract claim was preempted under the LMRA and that removal was appropriate under federal question jurisdiction. The Court now finds that Count IV is also preempted under the LMRA and grants summary judgment in favor of UPS on both counts.

The preemptive force of § 301 has been firmly established for more than two decades. *See, e.g., Caterpillar, Inc. v. Williams,* 482 U.S. 386, 393-94, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987); *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 218-19, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.,* 463 U.S. 1, 23, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983) . Preemption is mandated whenever "the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement." *Lingle v. Norge Div. of Magic Chef,* 486 U.S. 399, 405-06, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). [*9] Admittedly, "courts should proceed cautiously when preemption involves 'nonnegotiable rights conferred on individual employees as a matter of state law.'" *Buote v. Verizon,* 190 F. Supp. 2d 693, 701 (D. Vt. 2002) (quoting *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 261 n.8, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994)). The claims considered here, however, implicate no such rights.

The Court has already ruled that Thurber's breach of contract claim is preempted because the only document establishing contractual rights between the parties is the CBA and consequently resolution of the claim requires interpretation of the CBA. (Doc. 26.) UPS argues that Thurber's breach of fiduciary duty claim should likewise be preempted; in arguing the point, both parties rely on this Court's opinion in *Buote.* While the Court found that certain bad faith claims asserted by Buote did not require interpretation of the Union labor contract, the Court specifically held that Buote's breach of contract *and fiduciary duty claims* are necessarily preempted by the LMRA." *Buote,* 190 F. Supp. 2d at 703 (emphasis added). Thurber has failed to demonstrate the existence of any contract between the parties except the CBA; any fiduciary duties UPS owed [*10] to Thurber are accordingly defined therein. Proof of the elements of this claim would require the Court to interpret the CBA, and the claim is thus preempted under the LMRA.

Additionally, UPS is entitled to summary judgment on both counts based on Thurber's failure to assert a viable claim. Ordinarily, before bringing a claim under the LMRA, a plaintiff must show exhaustion of the grievance procedures detailed in the labor contract. However, a plaintiff may circumvent the exhaustion requirement in cases where a hybrid claim is asserted against both the employer for breach of contract and the employee's union for breach of the duty of fair representation. *Vaca v. Sipes,* 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967); *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 96 S. Ct. 1048, 47 L. Ed. 2d 231 (1976). Although a plaintiff may proceed on a hybrid claim against an employer alone (as Thurber has in this case, having dismissed all charges against Local 597 in January, 2006), the plaintiff "must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *Del Costello v. Int'l Bhd. of Teamsters,* 462 U.S. 151, 165, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983).

Thurber has failed to provide sufficient support [*11] for a hybrid claim. In particular, the record shows that from the time of the accident through the present, Thurber has been physically unable to meet the performance requirements of her former position and that UPS had no union positions at its facilities that Thurber could have performed given her medical restrictions. Thurber has failed to identify any provision within the CBA that requires UPS to create a position for her. Moreover, despite the evidence provided by UPS demonstrating the absence of any appropriate positions for her, Thurber has offered no specific facts to contradict this evidence. Summary judgment is appropriate. *See First Nat'l Bank v. Cities Serv. Co.,* 391 U.S. 253, 270, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968).

UPS has also sought dismissal on the grounds that both claims are barred by the statute of limitations. Courts generally require that hybrid claims under § 301 be brought within six months from "when the employee knew or should have known of the breach of the duty of fair representation." *Carrion v. Enterprise Ass'n, et al.,* 227 F.3d 29, 34 (2d Cir. 2000) (quoting *White v. White Rose Food,* 128 F.3d 110, 114 (2d Cir. 1997)). Because an issue of material fact exists, the Court does not grant [*12] summary judgment on this ground. [1]

1 Although UPS has persuasively argued that the alleged acts of breach on its part took place well outside the six-month window, the record is both more ambiguous and less developed with regard to the Union's alleged breach. Notably, the only document in the record specifically relating to the grievance procedure is a grievance report filed by Ms. Thurber with the Local 587. (Doc. 81.3 (Thurber Dep. Ex. 1).) Yet this document contains widely disparate dates, not clearly

indicating whether it was filed in January or October of 2004. Drawing all inferences in favor of the non-movant, there is a genuine issue of fact as to whether Thurber knew or should have known of the Union's breach as of October 28, 2005, six months prior to filing suit.

B. Count III

Count III of Thurber's amended complaint asserts a claim of bad faith against UPS in its handling of Thurber's worker compensation claim. A majority of jurisdictions, including Vermont, recognize so-called first-party bad-faith tort claims, in which an insured brings suit against its insurer for failure to make payment on a claim. *See* Bushey v. Allstate Ins. Co., 164 Vt. 399, 670 A.2d 807, 809 (Vt. 1995); *Dolan v. Aid Ins. Co.,* 431 N.W.2d 790, 791 n.1 (Iowa 1988) [*13] (compiling cases). An inescapable precondition for succeeding on such a claim is that the defendant stand in an insurer-insured relationship with the plaintiff, or, in the Workers' Compensation context, that the employer be a self-insurer. In this case, UPS has submitted an affidavit from the Vermont Department of Labor showing that it does not self-insure and has not self-insured for purposes of the Workers' Compensation Statute during any of the years relevant to this litigation. Thurber's own testimony and other documentation in the record indicate that Liberty Mutual is UPS's Workers' Compensation carrier; however, Liberty Mutual is not and has never been a party to these proceedings. Furthermore, there are no allegations of conduct evidencing bad faith other than a brief administrative delay in June, 2003, that Liberty Mutual long ago corrected. *See* Bushey, 670 A.2d at 809 (holding that insurers are not liable for good-faith errors in delaying claims). As such, Thurber's bad faith claim cannot be sustained. [2]

2 UPS has also argued that Thurber's bad faith claim is preempted under the LMRA and has urged the Court to revisit its decision in *Buote* with regard to preemption of bad-faith [*14] torts. Given that the bad-faith claim cannot be properly asserted against UPS in this case, the Court will not undertake a reexamination of *Buote* here.

C. Counts II, V, and VI

In Counts II, V, and VI, Thurber asserts three statutory claims: failure to reinstate in violation of § 643b of the Vermont Workers' Compensation Act ("VWCA"); unlawful discrimination (i.e. retaliation for filing a Workers' Compensation claim) in violation of § 710 of the VWCA; and violation of § 495 of the Fair Employment Practices Act ("FEPA"). Thurber has failed to meet her burden in establishing a prima facie case on all three counts; in each case, the failure may be traced back to two pivotal facts. First, Thurber's medical records indicate that since her accident she has been physically incapable of meeting the weight-lifting requirements (seventy-five pounds) mandated for all bargaining-unit positions at the UPS facility. In fact, during this period her surgeons have imposed a nearly continuous lifting restriction of twenty-five pounds or less. Second, based on her weight-lifting restrictions, UPS does not have and has not had any suitable alternative positions in which it could employ Thurber.

Section 643b [*15] mandates reinstatement of an injured worker "in the first available position suitable for the worker given the position the worker held at the time of the injury." Vt. Stat. Ann. tit. 21, § 643b(b) (2003). As a condition precedent, the statute requires that the worker recover within two years of the onset of the disability; recovery is defined to mean that "the worker can reasonably be expected to perform safely the duties of his or her prior position or an alternative suitable position." *Id.* § 643b(a)(2). In light of the facts indicated above, Thurber can show neither that she has recovered for purposes of the statute nor that there has ever been a suitable position. At most, Thurber has alleged that UPS may have temporarily accommodated other employees who could only lift up to fifty pounds. Even if these allegations could be proven, they would fail to provide a foundation for either of the elements of a § 643b claim. [3]

3 The Vermont Supreme Court has been presented with the opportunity to construe § 643b to include a "reasonable accommodation" provision and has refused to do so. *See* Wentworth v. Fletcher Allen Health Care, 171 Vt. 614, 765 A.2d 456 (Vt. 2000).

Section 710 prohibits employers from [*16] discharging or discriminating against an employee "because such employee asserted a claim for benefits under this chapter [Chapter 9, governing Workers' Compensation]." Vt. Stat. Ann. tit. 21, § 710 (2003). To withstand summary judgment, the plaintiff must present a prima facie case of retaliatory discrimination, consisting of four elements: "(1) he [or she] was engaged in a protected activity, (2) his [or her] employer was aware of that activity, (3) he [or she] suffered adverse employment decisions, and (4) there was a causal connection between the protected activity and the adverse employment decision." *Lowell v. IBM,* 955 F. Supp. 300 (D. Vt. 1997) (quoting *Murray v. St. Michael's College,* 164 Vt. 205, 667 A.2d 294 (Vt. 1995)). Furthermore, if the defendant articulates a legitimate, nondiscriminatory reason for the decision, then the

plaintiff will be required to show that this reason was a mere pretext for discrimination. *Id.*

The facts do not necessarily demonstrate an adverse employment decision--UPS has not discharged, suspended or otherwise closed its doors to Thurber--let alone a discriminatory motive. Assuming *arguendo* that Thurber had presented evidence of an adverse employment decision [*17] taken *on account of* her Workers' Compensation claim, UPS has nonetheless provided a "legitimate, nondiscriminatory reason" for failing to reinstate her, namely that there are no jobs available whose essential functions Thurber can perform. Since Thurber has introduced no evidence suggesting that this reasoning is pretextual, summary judgment must be granted.

Section 495 prohibits discrimination against "a qualified handicapped individual" unless "a bona fide occupational qualification requires persons of a particular . . . physical or mental condition." Vt. Stat. Ann. tit. 21, § 495(a)(1) (2003). Even assuming that Thurber could establish that she is a "handicapped individual" under § 495d(5) for purposes of the Act, she has failed to establish that she was qualified. "Qualified handicapped individual" is defined by FEPA as "an individual with a handicap who is capable of performing the essential functions of the job or jobs for which he is being considered with reasonable accommodation to his handicap." *Id.* § 495d(6). Thurber bears the burden of proving that she is a qualified handicapped individual; at a bare minimum, she must "present evidence as to [her] individual capabilities [*18] to perform the job in question and suggestions for some reasonable assistance or job modification by the employer." *State v. G.S. Blodgett Co.,* 163 Vt. 175, 656 A.2d 984, 989(Vt. 1995) (citing *Gilbert v. Frank,* 949 F.2d 637, 642 (2d Cir. 1991)).

Although this "is not a heavy burden," Thurber has not met it. *Id.* First, Thurber has not shown that she was capable of performing the "essential functions" of her former job. To the contrary, the uncontested facts show that she was not reinstated precisely because of her inability to perform the substantial amount of lifting involved. Second, Thurber has failed even "to produce evidence that a *reasonable* accommodation is possible." *Id.* The burden shifts to the employer to show that no reasonable accommodation is possible only *after* the plaintiff has made out their prima facie case. *Gilbert,* 949 F.2d at 642. Nonetheless, UPS has established that all bargaining unit positions at the facility including Thurber's former position require substantial lifting. Given the drastic differential between these lifting requirements and Thurber's documented physical capabilities, the Court finds that no reasonable accommodation could facilitate Thurber in meeting the [*19] essential requirements of any bargaining unit position. [4] Accordingly, Thurber's FEPA claim must be dismissed.

4 The requirement of reasonable accommodation does *not* oblige the employer to create a new position to accommodate the employee. *Norville v. Staten Island Univ. Hosp.,* 196 F.3d 89, 99 (2d Cir. 1999).

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment (Doc. 79) is GRANTED. Plaintiff's Motions to Compel (Docs. 82 and 99) are DENIED as untimely. Defendant's Motions to Strike (Docs. 98 and 102) are DENIED as moot.

Dated at Burlington, Vermont this 15th day of October, 2007.

/s/ William K. Sessions III

William K. Sessions III

Chief Judge

LEXSEE

DONNA TIRRELL, GENERAL ADMINISTRATRIX AND ADMINISTRATRIX AD PROSEQUENDUM OF THE ESTATE OF WALTER TIRRELL, PLAINTIFF-RESPONDENT, v. NAVISTAR INTERNATIONAL, INC., PREVIOUSLY KNOWN AS INTERNATIONAL HARVESTER CO., DEFENDANT, AND ROGERS BROTHERS CORPORATION, DEFENDANT-APPELLANT

No. A-5024-89T3

Superior Court of New Jersey, Appellate Division

248 N.J. Super. 390; 591 A.2d 643; 1991 N.J. Super. LEXIS 183; CCH Prod. Liab. Rep. P12,895

April 22, 1991, Argued
May 21, 1991, Decided

SUBSEQUENT HISTORY: [***1] Approved for Publication June 19, 1991.

PRIOR HISTORY: On appeal from the Superior Court of New Jersey, Law Division, Essex County.

COUNSEL: *Robert F. Colquhoun* argued the cause for appellant (*Colquhoun & Colquhoun*, attorneys, *Robert F. Colquhoun*, on the brief).

John M. Blume argued the cause for respondent (*Blume, Vazquez, Goldfaden, Berkowitz & Donnelly*, attorneys, *Carol L. Forte*, on the brief).

JUDGES: J.H. COLEMAN, DREIER and LANDAU.

OPINION BY: DREIER

OPINION

[*394] [**645] Defendant Rogers Brothers Corporation, the manufacturer of a flatbed tractor-trailer, appeals from a product liability judgment in favor of plaintiff arising out of the November 12, 1986 death of her late husband. The jury awarded $ 2,500,000 on plaintiff's wrongful death claim and $ 50,000 on the survival action for decedent's pain and suffering.

Plaintiff's theory of liability was that the manufacturer's failure to install a back-up signal created a design defect. [1] Decedent was an oiler, a trainee in charge of maintaining a backhoe, and was working laying a gas line from Lambertville to Belle Meade. He, an operating engineer, Louis O'Rourke, and the driver of the tractor-trailer, [***2] were directed by their supervisor to go to a site on Highway 31 near Ringoes, where an area of the pavement had settled. The backhoe to be operated by O'Rourke and maintained by decedent had been placed on a flatbed trailer and was driven to the site. O'Rourke and decedent drove their own cars and parked in a nearby lot. O'Rourke and decedent were talking to the foreman in the center of the southbound lane which had been closed to traffic, when the tractor-trailer driver started to back up the rig from where it had been parked at the curb. O'Rourke, who had not heard the tractor-trailer backing up, saw the movement out of the corner of his eye, but by then it was so close that it brushed his arm and knocked the foreman out of the way. He tried to grab decedent who was also knocked to the ground. The trailer's back wheels slowly rolled over decedent's chest. O'Rourke called out to the driver who stopped, leaving decedent between the two sets of tires. Decedent raised his head a little and then slumped down, apparently dead.

1 A similar allegation was made against the manufacturer of the tractor, but the jury determined that the tractor, also manufactured without a back-up alarm, was not defective. No claim was made against the driver of the tractor-trailer, a coemployee of decedent.

[***3] [*395] The trailer was approximately 45-feet long, and O'Rourke estimated that it had moved two or three trailer lengths when it struck decedent. There was no signalman observing the truck as it backed up, although O'Rourke knew that it was the practice to have someone watching when even a backhoe was moving to make sure no one got in the way. Ironically, as an operator's helper, decedent would perform this function when the backhoe was operated.

The tractor manufacturer's [2] staff engineer's deposition was read to the jury. In that deposition, he noted that there was a blind spot for the driver of the tractor when a backhoe was on the trailer. He personally made the observation and found that in such a situation the driver, despite extended side mirrors, could not see anything behind the trailer. Defendant's president's deposition was also read to the jury. Defendant understood that a function of the trailer would be to carry backhoes, yet the company did no safety tests to determine whether there would be blind spots when a driver was hauling equipment. Furthermore, defendant did not install back-up alarms without request or give advice to its customers of the existence [***4] or advisability of back-up alarms.

2 Hereafter Rogers Brothers, the trailer manufacturer, will be referred to as defendant.

Plaintiff's expert, George F. Bowden, a registered professional engineer, testified that the only ways one could back up safely with obscured vision to the rear were either to have a flagperson giving signals or to use an audible alarm that was "not [**646] only louder than the surrounding noise, but distinctive." There was no question that both electrical and mechanical back-up alarms had been available since the 1950's, would not have affected the utility of the trailer, are quite inexpensive (mechanical alarms costing approximately $ 35) and are easy to [*396] install. [3] It is true that the tractor had two West Coast mirrors, 16-inch vertical mirrors on either side of the vehicle, which gave full visibility without the trailer or with an empty trailer. But, depending upon what was placed on the trailer, visibility could still be obscured by the load. Defendant's president testified that as a [***5] manufacturer of low-bed trailers, defendant was regulated by the National Highway Traffic Safety Administration, and he understood that nothing in relevant legislation required back-up alarms, nor did he know of any requirement for such alarms.

3 The expert was also questioned concerning an OSHA regulation, as well as the National Safety Council's suggestion that there be back-up alarms on construction equipment, the Society of Automotive Engineers recommendation in favor of them, and the Corps of Engineers and Bureau of Mines requiring them at construction and mining sites. Yet, since the OSHA regulations imposed a duty on decedent's employer or coemployees, the OSHA regulations were ruled inadmissible. This issue was not pressed, and the questioning was limited.

Decedent, 28 1/2 years old at his death, earned approximately $ 35,000 per year as an oiler. O'Rourke, however, was training decedent to be an operating engineer and was about to recommend him for such advancement. As an operator, O'Rourke earned $ 24 [***6] an hour plus $ 9.25 per hour for benefits. With overtime he made between $ 65,000 and $ 80,000 per year, although other operating engineers made more than that. Plaintiff's economic expert testified that decedent had already earned $ 32,601 in 1986 prior to his demise. Plaintiff had testified in detail concerning the work decedent did at home and the time he spent with her and their four children, ages one, nearly four, six and seven years old at the time of their father's death. [4] The economist factored into the loss equation the time a spouse normally spends working in the house (ten hours per [*397] week), even though he acknowledged that this was less than the time decedent normally worked at his house. After deducting what decedent would have paid for his personal expenses, the expert testified that there had been a net earned income loss of $ 104,000 to the time of trial and a loss of physical household services of $ 15,865 (then reduced by three percent for sickness). This estimate contained no pecuniary value for the loss of companionship, guidance or advice. *See* Green v. Bittner, 85 *N.J.* 1, 11-12, 424 *A.*2d 210 (1980).

4 Plaintiff was permitted to introduce family pictures to corroborate the family situation. Defendants' *Evid.R.* 4 objection was overruled when the judge admitted the photographs, reasoning that the jury had a right to consider "the personalty of the decedent and his relationship with the family." This issue will be discussed in more detail, *infra*.

[***7] During the direct examination of plaintiff's expert, the attorney asked for a sidebar conference which actually was held in the empty jury room. Harold Braff, Esq., attorney for the tractor manufacturer, noticed a *Newsweek* magazine on the jury room table and stated to the judge and assembled attorneys, "[B]efore you go, I just wanted you to see what's on the table. 'The selling of safety' its a *Newsweek* article." Although this was not put on the record at the time, the event was noted without objection at the new trial motion. Defendant's argument for a new trial based upon this event will be discussed *infra*.

I

The original complaint in this matter had charged defendant with negligence, strict liability, breach of warranty and gross negligence. On the first day of trial, plaintiff successfully sought to dismiss its negligence and warranty claims and proceed only on the strict liability count. Initially, counsel for defendant simply responded,

"o.k." Later, however, while arguing a motion addressed to peremptory challenges, counsel asserted opposition to the dismissal, stating that plaintiff was trying to "emasculate the defense of contributory [**647] or comparative or third-party [***8] negligence," and simply wanted to "attempt to impair the defense in this case." The judge adhered to his earlier ruling. Defendant's challenge has been reiterated in this appeal.

[*398] There are two definitive answers to the defense argument. First, we have noted that the complaint in this matter was filed September 17, 1987. The New Jersey Product Liability Act, in an explanatory note to N.J.S.A. 2A:58C-1 (*L.*1987, *c.* 197, § 8) provides that the Act, enacted July 22, 1987, applies to "product liability actions filed on or after the date of enactment." Thus, where the Product Liability Act conflicts with the common law, it governs this action. The Product Liability Act no longer recognizes negligence or breach of warranty (with the exception of an express warranty) as a viable separate claim for "harm" (as defined in the Act) caused by a defective product. The Act, in N.J.S.A. 2A:58C-1b(3), defines a "product liability action" as

> any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty.

N.J.S.A. 2A:58C-2 established the sole [***9] method to prosecute a product liability action.

> A manufacturer or seller of a product shall be liable in a product liability action *only* if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose . . . . (Emphasis added).

Since a product liability action encompasses "*any* claim or action brought by a claimant for harm caused by a product," N.J.S.A. 2A:58C-1, (emphasis added), and section 2 describes the sole method of proof, namely that recognized for strict liability claims, it is clear that common-law actions for negligence or breach of warranties (except express warranties) are subsumed within the new statutory cause of action, if the claimant and harm also fall within the definitional limitations of section 1. [5]

> 5 N.J.S.A. 2A:58C-1(a) states that the "sponsors' or committee statements . . . adopted or included in the legislative history of this act shall be consulted in the interpretation and construction of this act." In discussing sections 2 through 4 of the Act, the Senate Judiciary Committee Statement and the Assembly Insurance Committee Statement provide that the sections were intended to establish clear rules where the court decisions may have created uncertainty "while reserving the concept that manufacturers may be held *strictly liable* for harm caused by products that are defective." (Emphasis added). Thus, lest there be any thought that the surviving "product liability action" is a negligence or breach of warranty claim, these statements establish that the surviving cause of action is one of strict liability governed by the Act, and, where the Act is inapplicable, the common law.

[***10] [*399] The second support for the judge's ruling is the common law which preceded the 1987 Act. In *Heavner v. Uniroyal, Inc.*, 63 *N.J.* 130, 157, 305 *A.*2d 412 (1973), the Court determined that a personal injury claim was to be founded on strict liability rather than a breach of an implied warranty under the Uniform Commercial Code. This was reiterated in *Realmuto v. Straub Motors, Inc.*, 65 *N.J.* 336, 345, 322 *A.*2d 440 (1974) and *Collins v. Uniroyal, Inc.*, 126 *N.J.Super.* 401, 406, 315 *A.*2d 30 (App.Div.1973), *aff'd*, 64 *N.J.* 260, 315 *A.*2d 16 (1974).

With regard to strict liability having superceded negligence under a common-law theory, in *Masi v. R.A. Jones Co.*, 163 *N.J.Super.* 292, 297, 394 *A.*2d 888 (App.Div.1978), this court determined that the failure to charge negligence in addition to strict liability for a design defect claim was not error. Since the strict liability claim placed a lesser burden upon a plaintiff, an adverse determination concerning strict liability obviated any possible [***11] verdict on a negligence theory. [6] In any event, the [**648] Product Liability Act has now codified these common-law rules, and only a single product liability action remains.

> 6 *Cartel Capital Corp. v. Fireco of New Jersey*, 81 *N.J.* 548, 562, 410 *A.*2d 674 (1980), is not to the contrary. There, both a strict liability and negligence claim were allowed to proceed to the jury. But the strict liability claim was based upon the retailer's responsibility as the seller of a defective product, while the negligence allegations related to the retailer's separate responsibility for improper installation of the product. In that special situation, both causes of action could proceed to judgment, so long as plaintiff's eventual recovery did not exceed the value of the loss sustained.

II

Defendant next contends that decedent, who was neither responsible for nor directly concerned with the operation of the [*400] trailer, was excluded from the ambit of the employee comparative negligence rule established [***12] in *Suter v. San Angelo Foundry & Mach. Co.*, 81 *N.J.* 150, 167, 406 *A.*2d 140 (1979). The Court there held that

> an employee engaged at his assigned task on a plant machine, as in *Bexiga [v. Havir Mfg. Corp.*, 60 *N.J.* 402, 290 *A.*2d 281 (1972)], has no meaningful choice. Irrespective of the rationale that the employee may have unreasonably and voluntarily encountered a known risk, we hold as a matter of policy that such an employee is not guilty of contributory negligence.

81 *N.J.* at 167, 406 *A.*2d 140.

The text of the Product Liability Act itself has no direct bearing on the comparative negligence rules, except insofar as *N.J.S.A.* 2A:58C-3a(2) (the consumer expectation/obvious danger defense to a design defect claim), may be applicable to some claims. But there is a specific exception in that section for "industrial machinery or other equipment used in the workplace," and the rules are "not intended to apply to dangers posed by products such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the product." Furthermore, [***13] both the Assembly and Senate Statements accompanying the Act expressly disclaim application to workplace injuries:

> In particular, sections 2 through 4 are not intended to affect the holding in [*Suter*], with respect to the application of the principle of comparative fault in cases involving workplace injuries.

Defendant finds solace in the original phraseology of *Suter*, which could be interpreted as limiting the employee exception to "an employee engaged at his assigned task on a plant machine." 81 *N.J.* at 167, 406 *A.*2d 140. [7] This language has given rise to at least two issues: First, is there a limitation to industrial machinery in a plant? *Compare* *Rivera v. Westinghouse Elevator Co.*, 107 *N.J.* 256, 260-261, 526 *A.*2d 705 [*401] (1987) (raising but not resolving the issue) *with* *Crumb v. Black & Decker (U.S., Inc.)*, 204 *N.J.Super.* 521, 527-528, 499 *A.*2d 530 (App.Div.1985), *certif. granted*, 102 *N.J.* 386, 508 *A.*2d 247 (1985), *appeal dismissed* 104 *N.J.* 432, 517 *A.*2d 425 (1986) [***14] (applying the *Suter* protection). Second, should a plaintiff continue to be absolved from a workplace injury when he voluntarily and unreasonably encounters a known risk? *See* *Green v. Sterling Extruder Corp.*, 95 *N.J.* 263, 270, 471 *A.*2d 15 (1984) indicating some question concerning this aspect of the *Suter* rule).

> 7 The Supreme Court in *Suter* also noted that in treating the case before it involving an industrial plant machine, it was not "passing upon other situations wherein an employee may similarly be held to have had no meaningful choice." 81 *N.J.* at 167 n. 5, 406 *A.*2d 140.

As to the first issue, by the Legislature's use of the term "workplace injuries," any limitation of the *Suter* principle to a factory setting would now clearly be inappropriate. The Legislature's intention also to resolve the second issue is less clear from the text of the Act; but the Committee Statements indicate that the Legislature did not want to [***15] change the comparative fault rules of *Suter*. Furthermore, in *Crumb*, we interpreted the *Suter* principle:

> The essence of the *Suter* rule is that the employee had no meaningful choice. He either worked at his assigned task or was subject to discipline or being labelled as a troublemaker.

204 *N.J.Super.* at 527, 499 *A.*2d 530. It is true that had decedent known that there was no back-up alarm on the trailer, he could have refused to work on the job. But, as we noted in *Crumb*, such action could subject him to disciplinary action or [**649] other adverse consequences. He had no meaningful choice. [8]

> 8 *But see* *Colella v. Safway Steel Products*, 201 *N.J.Super.* 588, 592-593, 493 *A.*2d 634 (Law Div.1985) (refusing to apply the *Suter* protection upon a finding of meaningful choice). Insofar as *Colella* conflicts with *Suter* and *Crumb*, it must be considered overruled.

A positive answer to the second issue would require us [***16] to reconsider the *Suter* rule, an action which the court has shunned since 1979. We cannot disobey *Suter's* clear directive. Furthermore, the back-up alarm was not meant to warn an attentive worker who had already seen the trailer backing up. [*402] Rather, it was meant to attract the attention of inattentive persons in the area of the danger. As we also noted in *Crumb*, 204 *N.J.Super.* at 528, 499 *A.*2d 530, *Suter* and *Bexiga*

both stated that "it would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against." 81 *N.J.* at 167, 406 *A.*2d 140; 60 *N.J.* at 412, 290 *A.*2d 281. Even if decedent had known that he was working with a trailer without a back-up alarm, and the *Suter* employer comparative fault rule were inapplicable, it would be against public policy, as expressed in *Bexiga, Suter*, and their progeny, for decedent to be barred by a finding that he had proceeded in the face of a known danger under the circumstances of this [***17] case.

Defendant also claims that trade custom showed that trailer manufacturers did not include such back-up alarms, and thus defendant had no duty to do so. This argument was effectively disposed of in *Michalko v. Cooke Color & Chem. Co.:*

> We have repeatedly stated, however, that in this context trade custom is not dispositive of compliance with a legal duty . . . . A manufacturer may have a duty to install safety devices regardless of whether it was the custom of the trade for the ultimate purchaser to install them.

91 *N.J.* 386, 397, 451 *A.*2d 179 (1982) (citation omitted).

III

Defendant asserts that since decedent was neither a user nor consumer of the trailer, but merely a bystander, he may not assert a claim of strict liability. Even if decedent might be considered as other than a "user or consumer," we reject such an interpretation of this strict liability doctrine. *Restatement (Second) of Torts*, § 402A (1965), caveat (1), notes that the American Law Institute "expresses no opinion as to whether the rules stated in this Section may not apply . . . to harm to persons other than users or consumers . . . ." Comment (*o*) to caveat [***18] (1) explains that as of 1965, courts had

> not gone beyond allowing recovery to users and consumers . . . . Casual bystanders, and others who may come in contact with the product, as in the case [*403] of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery . . . .

In *Monsanto Co. v. Alden Leeds, Inc.*, 130 *N.J.Super.* 245, 263, 326 *A.*2d 90 (Law Div.1974), and in *Lamendola v. Mizell*, 115 *N.J.Super.* 514, 524, 280 *A.*2d 241 (Law Div.1971), the courts recognized the right of a third party other than a user or consumer to invoke the rules of strict liability. *See also dictum* in *Suter*, 81 *N.J.* at 171, 406 *A.*2d 140 (where the court, quoting from Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss.L.J.* 825, 835 (1973), appeared to extend the doctrine to those who "came into contact with [the product] or were in the vicinity of it").

The Product Liability Act contains an implicit recognition that one other than a user or consumer is protected [***19] by the doctrine. In the exception to the state-of-the-art defense for egregiously unsafe or ultra-hazardous products which have little or no usefulness, the Legislature stated that the defense could be avoided, *inter alia*, where "[t]he ordinary user or consumer of the product cannot reasonably be expected to have knowledge of the product's risks, or the product poses a risk of serious injury to persons *other than the user or consumer."* *N.J.S.A.* 2A:58C-3b(2) (Emphasis added). [**650] If a person "other than the user or consumer" was not able to assert a strict liability claim, this language would have been superfluous. Since the Legislature was presumed to know the state of the law when it enacted the Product Liability Act, and provided in the Committee Statements that it did not intend to "affect existing statutory and common law rules . . . not expressly addressed by this legislation," we think it clear that plaintiff, even if considered a bystander, could properly assert a cause of action in strict liability.

IV

Defendant urges that the exclusion of the OSHA regulations from evidence should have precluded an opinion by plaintiff's expert that the trailer should properly have [***20] been equipped [*404] with a back-up alarm. Defendant claims that the expert expressed only a "net opinion." We disagree. The expert's conclusion was based upon actual examination of the tractor and trailer to determine the blockage of vision. Furthermore, he demonstrated an expertise concerning back-up alarms and the necessity for flagmen. His opinion only incidentally related to the admissibility of OSHA regulations and he was clearly familiar with other governmental and safety standards. As required by *Evid.R.* 19 and 56(2), his opinion was based upon his own "experience, training or education," and he explained how he reached his conclusions, irrespective of the OSHA regulation. We see no net opinion, *i.e.*, a "failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom" based upon a bare conclusion "unsupported by factual

evidence." *Buckelew v. Grossbard*, 87 *N.J.* 512, 524, 435 *A.*2d 1150 (1981). *And see Johnson v. Salem Corp.*, 97 *N.J.* 78, 91, 477 *A.*2d 1246 (1984).

V

Defendant argues that the *Newsweek* [***21] article found in the jury room had the capacity to influence the verdict, and its presence should have required the trial judge to have granted a new trial. [9] We have no doubt that the *Newsweek* article found on the jury room table, the substance of which was that manufacturers were failing to provide available safety devices, [*405] was objectionable material if read by the jurors during their service on this case. There was no showing, however, that any juror had read the publication, how it found its way into the jury room, whether Mr. Braff had opened the magazine to the article or whether it had already been so opened by a juror, or generally whether there had been any actual taint.

9 We note initially that defendant failed to seek leave to expand the record to include the text of the article which nevertheless was reproduced in its appendix. Ordinarily, we would not consider such information. Here, however, counsel for codefendant had placed on the record the name and source of the article, which is readily retrievable from a published source and could well be thought of as incorporated by reference or the subject of judicial notice. *Evid.R.* 9(2)(e). Rather than our taking the additional time to remand for expansion of the record or requiring a separate motion now to supplement the record, we will take notice of the article and consider the substance of defendant's argument.

[***22] Ordinarily, there should have been an immediate *voir dire* of the jurors to resolve these issues. Yet we are also moved by the fact that defense counsel during the trial requested no such *voir dire*, voiced no objection to the magazine remaining in the jury room, and only raised this issue once a substantial jury verdict was returned against defendant. The lack of objection by experienced counsel calls not for an analysis by us to determine whether there was plain error, *R.* 2:10-2, but rather whether there was invited error. *State v. Vaszorich*, 13 *N.J.* 99, 114, 98 *A.*2d 299 (1953), *cert. denied*, 346 *U.S.* 900, 74 *S.Ct.* 219, 98 *L.Ed.* 400 (1953); *Ench v. Bluestein*, 52 *N.J.Super.* 169, 178, 145 *A.*2d 44 (App.Div.1958). Not having expressed an objection at the time, defense counsel was left with potentially reversible error, never called to the judge's attention, remaining in the case, preserved for assertion if a substantial verdict were to be returned, but subject to waiver if a lower verdict ensued.

[**651] Given the potential adverse effect of the [***23] article, we have reviewed the jury verdict to see if we could discern any substantial effect from the article, if it actually had been read by jurors. First, we see no effect on the liability judgment. The risk/utility factors strongly predominated in favor of plaintiff. In fact, the defect asserted by plaintiff came close to justifying the court's taking the liability issue from the jury. *See Johnson v. Salem Corp.*, 97 *N.J.* 78, 89, 477 *A.*2d 1246 (1984). The lack of a back-up alarm on a truck or trailer where rear vision is or could be expected to be obscured has certainly been recognized by the courts as a defect. *See e.g., Verge v. Ford Motor Co.*, 581 *F.*2d 384 (3rd Cir.1978) (Virgin Island case, citing to New Jersey law); *and cf.* discussion in *Mott v. Callahan Ams Mach. Co.*, 174 *N.J.Super.* 202, 207-208, 416 [*406] *A.*2d 57 (App.Div.1980), cited with approval and modified in *Michalko*, 91 *N.J.* at 397, 451 *A.*2d 179. The fact that the jury found liability only against the trailer manufacturer and not the tractor manufacturer showed [***24] that the jury did not automatically assess liability against defendant manufacturers, but rather considered the individual merits of the claims against the two defendants.

As noted *infra*, the quantum of damage awards also showed no inordinate punishment of defendant. Considering the expert proof of the present value of decedent's earnings, home duties, and the loss of companionship, counsel and guidance suffered by the decedent's family (reimbursable under *Green v. Bittner, supra*, 85 *N.J.* at 11-12, 424 *A.*2d 210), the damages awarded to the children and widow likewise appear to have no punitive aspect.

Under the special situation of this case and the manner in which the issue came before the court, we reject defendant's claim of jury taint based upon the presence of the *Newsweek* article.

VI

Defendant's final four sub-points relate to the quantum of the verdict. It claims that decedent's coworker, O'Rourke, had been mistakenly permitted to testify concerning decedent's future earnings. Also, defendant objects to the court's charge concerning conscious pain and suffering; asserts that the family photographs admitted into evidence improperly [***25] influenced the jury to return an excessive verdict; and lastly, claims that the jury failed to follow the court's charge, and thus returned an excessive award.

A.

It is clear that O'Rourke testified as a lay witness relating the facts surrounding the accident itself, decedent's job history, and his own knowledge of the pay

scales relating to [*407] oilers and operating engineers working with construction equipment. He also gave his opinion of decedent's probable job progress; but lay opinion is not excluded *per se*. *Evid.R.* 56(1) permits such opinions if the judge finds them to "be rationally based on the perception of the witness and . . . helpful to a clear understanding of his testimony or to the determination of the fact in issue." The earnings of an operating engineer were known to the witness. He further had perceived decedent's progress as an oiler and assessed his capabilities for advancement. His intentions to recommend decedent as an equipment operator were a statement of his own state of mind, and not an opinion at all, although decedent's capability to do the job and probabilities of acceptance by the union were. From this proper testimony, it was for the jury [***26] to conclude whether decedent had a reasonable probability of being promoted and what his then-probable earnings would have been. O'Rourke did no more than testify concerning his observations and his lay opinion reasonably relating thereto. *Cf.* *State v. LaBrutto*, 114 *N.J.* 187, 199-200, 553 *A.*2d 335 (1989).

B.

The issue of the award for conscious pain and suffering requires little discussion. While it is true that decedent died practically instantaneously after the truck had crushed his chest, there was testimony that he at least raised his head [**652] before he died. Defense counsel suggests that this motion was a spasmatic reaction after death, and this might be so. Yet, for some finite period the slowly-moving truck dragged decedent under its wheels and the jury was free to infer that decedent had some brief but distinct anticipation of his impending death as well as physical pain and suffering.

C.

Defendant next posits that the introduction of three family photographs showing decedent with his wife and children [*408] improperly inflamed the jury, and impermissibly increased the size of the verdict. It seeks to equate the admission of these [***27] photographs with those excluded in *Burd v. Vercruyssen*, 142 *N.J.Super.* 344, 355, 361 *A.*2d 571 (App.Div.1976), *certif. denied*, 72 *N.J.* 459, 371 *A.*2d 64 (1976). The photographs in *Burd* involved gruesome photographs of the decedent's body, and the court held that the potential for prejudice outweighed the possible probative value of the photographs. Under *Evid.R.* 4 the weighing of the elements giving rise to permissible exclusion of otherwise admissible evidence is left to the sound discretion of the trial judge. While there was little in the photographs that had not been learned from plaintiff's testimony, defendant had raised questions concerning the family history. The photographs showed an intact family, verified the closeness of the children's ages, and indicated an apparent bond among the family members. We find no error here.

D.

Lastly, defendant asserts that the $ 2,550,000 verdict was so against the weight of the evidence as to constitute a miscarriage of justice. Defendant notes that plaintiff's expert had estimated the family's net pecuniary loss as of the time of trial at $ 104,000, [***28] and the most the jury therefore could have awarded for the remainder of decedent's working life was $ 1,600,000. However, considering the work decedent did around the house and the damages for advice and companionship permitted by *Green v. Bittner, supra*, the $ 900,000 additional award, even if split equally among the widow and four children, would yield but $ 180,000 each for a lifetime's loss of a husband or father. If the jury accepted the fact that decedent would be promoted and potentially would be earning between $ 65,000 and $ 80,000 per year, the additional damages become insignificant.

We realize that the net effect of this award is that a family whose chief bread winner was earning approximately $ 35,000 a [*409] year at age 28 will now have $ 2,550,000 (less fees and disbursements) to invest, with a return, even accounting for inflation, far in excess of what decedent could ever have provided to the family. But, based upon the evidence presented at trial and our current system of damage awards, we cannot say that the jury's assessment was "so disproportionate to the injury and resulting disability shown as to shock [our] conscience [***29] and to convince [us] that to sustain the award would be manifestly unjust." *Baxter v. Fairmont Food Co.*, 74 *N.J.* 588, 596, 379 *A.*2d 225 (1977). There was no miscarriage of justice under the law. *R.* 2:10-1.

Affirmed.